Chapter XXVIII.

GENERAL ELECTION CASES, 1860 TO 1870.

845. The Maryland election case of Preston v. Harris in the Thirty-sixth Congress.

The House declined to reject the poll for riot which did not interrupt the election or prevent an ascertainment of result.

[1] Additional cases in this period, classified in different chapters, are:

Thirty-sixth Congress—
- Love, California. (Sec. 314.)
- Chrisman, *v.* Anderson, Kentucky. (Sec. 538.)

Thirty-seventh Congress—
- Foster, North Carolina. (Vol. I, sec. 362.)
- Pigott, North Carolina. (Vol. I, sec. 369.)
- Segar, Virginia. (Vol. I, sec. 363.)
- Upton, Virginia. (Vol. I, sec. 366.)
- Beach, Virginia. (Vol. I, sec. 367.)
- Wing, *v.* McCloud, Virginia. (Vol. I, sec. 368.)
- Grafflin, Virginia. (Vol. I, sec. 371.)
- McKenzie, Virginia. (Vol. I, sec. 372.)
- Beach *v.* Upton, Virginia. (Vol. I, sec. 686.)
- Rodgers, Tennessee. (Vol. I, sec. 370.)
- Hawkins, Tennessee. (Vol. I, sec. 373.)
- Flanders and Hahn, Louisiana. (Vol. I, sec. 379.)
- Byington *v.* Vandever, Iowa. (Vol. I, sec. 490.)
- Shieb *v.* Thayer, Oregon. (Vol. I, sec. 613.)
- Morton *v.* Daily, Nebraska. (Vol. I, secs. 615, 687.)
- Kline *v.* Verree, Pennsylvania. (Vol. I, sec. 727.)

(For footnotes 2, 3, 4, and 5 see page 2.)

On February 27, 1861,[6] the Committee of Elections reported in the case of Preston *v.* Harris, of Maryland. No decision in this case was reached by the House. The report of the committee was in favor of the sitting Member, who remained undisturbed in his seat.

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[2] Additional cases in the Thirty-eighth Congress:
McKenzie, *v.* Kitchin, Virginia. (Vol. I, sec. 374.)
Chandler and Segar, Virginia. (Vol. I, sec. 375.)
Fields, Louisiana. (Vol. I, sec. 376.)
Bonanzo, Fields, Mann, Wells, and Taliaferro, Louisiana. (Vol. I, sec. 381.)
Bruce, *v.* Loan, Missouri. (Vol. I, sec. 377.)
Knox, *v.* Blair, Missouri. (Vol. I, sec. 716.)
Henry, *v.* Yeaman, Kentucky. (Vol. I, sec. 378.)
Johnson, Jacks, and Rogers, Arkansas. (Vol. I, sec. 380.)
Jayne *v.* Todd, Dakota. (Vol. I, sec. 619.)
Carrigan *v.* Thayer, Pennsylvania. (Vol. I, sec. 712.)
Kline *v.* Myers, Pennsylvania. (Vol. I, sec. 723.)
Gallegos, *v.* Perea, New Mexico. (Vol. I, sec. 728.)

[3] Additional cases in the Thirty-ninth Congress:
Koontz *v.* Coffroth, Pennsylvania. (Vol. I, sec. 556.)
Fuller *v.* Dawson, Pennsylvania. (Vol. I, sec. 556.)

[4] Additional cases in the Fortieth Congress:
Hamilton, Tennessee. (Vol. I, sec. 315.)
Butler, Tennessee. (Vol. I, sec. 455.)
Jones *v.* Mann and Hunt *v.* Menard, Louisiana. (Vol. I, sec. 326.)
Blakely *v.* Golladay, Kentucky. (Vol. I, sec. 322.)
The Kentucky Members, Kentucky. (Vol. I, sec. 448.)
Smith *v.* Brown, Kentucky. (Vol. I, sec. 449.)
McKee *v.* Young, Kentucky. (Vol. I, sec. 451.)
Symes *v.* Trimble, Kentucky. (Vol. I, sec. 452.)
Casement, Wyoming. (Vol. I, sec. 410.)
Wimpy and Christy, Georgia. (Vol. I, sec. 459.)
McGrorty *v.* Hooper, Utah. (Vol. I, sec. 467.)
Chaves *v.* Clever, New Mexico. (Vol. I, sec. 541.)
Hunt and Chilcott, Colorado. (Vol. I, sec. 599.)
Stewart *v.* Phelps, Maryland. (Vol. I, sec. 739.)

[5] Additional cases in the first session of the Forty-first Congress:
Rodgers, Tennessee. (Vol. I, sec. 317.)
Hunt *v.* Sheldon, Louisiana. (Vol. I, secs. 328–336.)
Sypher *v.* St. Martin, Louisiana.
Kennedy and Morey *v.* McCranie, Louisiana. (Vol. I, secs. 328–336.)
Newsham, *v.* Ryan, Louisiana.
Darrall *v.* Bailey, Louisiana. (Vol. I, secs. 328–336.)
The Georgia Members. (Vol. I, sec. 388.)
Ziegler *v.* Rice, Kentucky. (Vol. I, sec. 460.)
Tucker *v.* Booker, Virginia. (Vol. I, sec. 461.)
Whittlesey *v.* McKenzie, Virginia. (Vol. I, sec. 462.)
Grafton *v.* Connor, Texas. (Vol. I, sec. 465.)
Covode *v.* Foster, Pennsylvania. (Vol. I, sec. 559.)
Hoge and Reed, South Carolina. (Vol I, sec. 620.)
Wallace *v.* Simpson, South Carolina. (Vol. I, sec. 620.)
Boyden, *v.* Shober, North Carolina. (Vol. I, sec. 456.)

[6] Second session Thirty-sixth Congress, House Report No. 89; 1 Bartlett, p. 346; Rowell's Digest, p. 169.

The objection of the contestant that certain judges of the election were not qualified the committee dismissed as not sustained by the evidence.

Upon the objection that a condition of riot, lawlessness, and intimidation prevailed in the seven city wards that gave heavy majorities for the sitting Member, the committee found that there was no such disorder as to bring the case within the recognized ruling of the law of election as to riots. The committee say:

> The only cases in which elections have been set wide for this cause are where there was riot at the polls, or such tumult as interfered with the election, and prevented an ascertainment of the result.
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> This rule is laid down in 2 Hayward on County Elections (pp. 580, 581, 582, 584). This was a case where a riot occurred at the polls that led to the assault of the high sheriff in the execution of his duty, and was of such a character as led to the closing of the poll, and the election was set aside upon this ground and the illegal conduct of the high sheriff.
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> Another case will be found in 1 Rowe on Elections (p. 334), where there was such riot and tumult as to interrupt the election.
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> And another case, in Sheppard on Elections (pp. 105, 106), where it was held that if riots are carried to a great extent, accompanied with personal intimidation, so as to exclude the possibility of a fair exercise of the franchise, they will avoid the election; as where, in this case, the returning officer, being alarmed by the mob, offered to return whoever the sitting Member chose to name; and he indicating himself, the sheriff returned him.
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> And it is further laid down in 4 Selden (pp. 93 and 94) that, "should a gang of rowdies gain possession of the ballot box before or after the canvass of the votes, and destroy the whole or a portion of the ballots, or introduce others into the box surreptitiously, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected."
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> Also, in 1 Peckwell (p. 77), which was a case of "the most enormous and unexampled riots;" and it was proved that the mayor was applied to to bring in the military to quell them, and the poll was stopped, and not resumed until quiet was restored. The same law is laid down in Haywood on Elections (pp. 580, 581, 582, 584); also in Rowe on Elections (p. 334); also in Sheppard on Elections (pp. 105 and 106); also in the celebrated Westminster cases and the Pontefract case.
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> Now, it is very clear, from the evidence, that no such condition of things existed in the case under consideration. At every one of the polling places in the district of the sitting Member the election was uninterrupted; the votes were all quietly canvassed; the judges signed the returns; they were transmitted, as the law requires, to the governor of the State; the governor made proclamation of the result, and transmitted to the sitting Member a certificate of his due election. He is, therefore, in his seat under all the observed solemnities of the laws of Maryland.

846. The Oregon election case of Shiel v. Thayer in the Thirty-seventh Congress.

The House held valid an election called on a date fixed by a State constitution, although the legislature had had an opportunity to fix the times, etc.

May a State constitution fix the times, etc., beyond control of the legislature?

On July 26, 1861,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee of Elections, made a report in the Oregon contested case of Shiel *v.* Thayer.

In this case the sitting Member based his claim to the seat on the undisputed fact that he had a majority of all the votes cast for Congressman on the 6th of November, 1860, the day of the Presidential election. The legislature of Oregon had fixed no time for the election of Congressman, but on the first Monday of June,

[1] First session Thirty-seventh Congress, House Report No. 4; 1 Bartlett, p. 349; Rowell's Digest, p. 171.

1860, an election had been held at which Mr. Shiel undisputably had a majority of the votes cast for Congressman.

It is evident, therefore, that the question on which the case turned was the legality of the June election.

The committee unanimously concluded that the June election was legal. Oregon, on February 14, 1859, was admitted to the Union on a constitution adopted on November 9, 1857. That constitution provided in the body of it that "general elections shall be held on the first Monday of June, biennially," and in a schedule adopted as part of the constitution:

> If this constitution shall be ratified, an election shall be held on the first Monday in June, 1858, for the election of members of the legislative assembly, a Representative in Congress, and State and county officers; and the legislative assembly shall convene at the capital on the first Monday in July, 1858, and proceed to elect two Senators in Congress, and make such further provisions as may be necessary to the complete organization of a State government.

The committee discuss the case as follows:

> The constitution having been, as before stated, adopted by the people in November, 1857, in pursuance of the foregoing provision, an election was held on the first Monday of June, 1858, at which a Representative in Congress, the honorable Mr. Grover, was elected, and a legislative assembly, which met at the capital on the first Monday in July, 1858, and chose two United States Senators, Messrs. Lane and Smith. On the admission of the State into the Union, February 14, 1859, Mr. Grover took his seat in the House of Representatives, and Messrs. Lane and Smith theirs in the Senate, by virtue of these elections. Mr. Grover's term of office expired on the 4th of March following.
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> By another provision of the same schedule, section 7, it is provided that "all laws in force in the Territory of Oregon when the constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." It was enacted by the territorial legislature in 1845 that "a general election shall be held in the several election precincts in this Territory on the first Monday of June in each year, at which there shall be chosen so many of the following officers as are by law to be elected in each year—that is to say, a Delegate to Congress, members of the Territorial council and house of representatives, judges of probate, district attorneys," etc.
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> The committee are of opinion that the "general election" provided for in the constitution, to be held once in two years, on the first Monday in June, was designed to embrace at least all such officers as were to be voted for by the people of the whole State, including a Representative in Congress; and that, inasmuch as the same constitution provided for the first of those elections, including by name a Representative in Congress, on the first Monday in June, 1858, an election should be held at the next general election in 1860 for a Representative to the Congress next to be held after said election—that is, to the present Congress—and that the contestant, having at that time received a majority of the votes cast, is duly elected.
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> The committee would have bad no difficulty in coming to this conclusion had it not been for the action of the legislature of Oregon upon this subject. Notwithstanding this constitutional provision that general elections shall be held on the first Monday of June biennially, the legislature of Oregon seems to have believed that it had power to fix another time for the election of Representative in Congress. On the 1st day of June, 1859, a law was enacted providing for the election of a Representative in Congress on the 27th day of June, 1859. By virtue of an election on that day the honorable Mr. Stout received a certificate of election to the Thirty-sixth Congress, and served during the term as such. At the session of the legislature in September last both branches acted upon the idea that, notwithstanding this provision in the constitution of Oregon, the legislature had the power to fix another day for the election of a Representative in Congress. A bill passed each branch fixing the day of the Presidential election, for an election of a Representative in Congress once in four years, and for such election at the general election in the alternate years. But the two branches of the legislature differed upon the question whether it should apply to the election of a Representative to the present Congress, and so the bill never became a law. Various reasons have been given for this action of the legislature, about which the contestant and sitting Member widely differ. The committee have

not deemed it necessary to determine what those reasons are, for, with all due respect to the opinions of the gentlemen composing that legislature, they are of opinion that this House must nevertheless be the final judge of the meaning of this clause of the constitution of Oregon, so far as it touches the question under consideration. And for the reasons stated, the committee have no doubt that the constitution of the State has fixed, beyond the control of the legislature, the time for holding an election of Representative in Congress at the general election to be held biennially, and that at such election so held in pursuance of the constitution the contestant was duly elected to the Thirty-seventh Congress. They therefore report the following resolutions:

Although the report of the committee was unanimous, opposition developed when the question was discussed in the House on July 30.[1]

Mr. Thaddeus Stevens, of Pennsylvania, offered as a substitute for the proposition of the Committee on Elections an amendment declaring that neither Mr. Shiel nor Mr. Thayer was entitled to the seat. He admitted that the constitution of a State might fix the time for the first election, but contended that after the first election the time should "be prescribed in each State by the legislature thereof," in the words of the Constitution of the United States.

Mr. Dawes replied that if there were a conflict between the legislature and the constitution of Oregon there might be ground for the amendment proposed. But the legislature, by passing no law, had acquiesced in the provision of the State constitution. In the opinion of Mr. Dawes, the provision of the United States Constitution which used the word "legislature" meant that the time should be fixed by the constituted authorities of the State. Most of the Members from new States had come to the House by virtue of elections fixed by their constitutions.

On the question of adopting Mr. Stevens's amendment there appeared, yeas 37, nays 77;[2] so the amendment was rejected.

The resolutions of the committee declaring Mr. Shiel, the contestant, entitled to the seat and declaring sitting Member not entitled to it, were then agreed to without division.

847. The Pennsylvania election case of Butler v. Lehman in the Thirty-seventh Congress.

The House having passed on the prima facie title to the seat, the Elections Committee declined to reopen that question.

The House being of opinion that votes were cast as returned, declined to reject the return because not signed by the election judge as required by law.

The House, overruling the committee, declined to find the return of the election officers fraudulent on the strength of an impeached recount of the votes.

In order for a recount of votes to rebut the presumption in favor of the election officers it must be shown that the boxes have been kept inviolate.

On January 7, 1862,[3] the Committee on Elections reported in the Pennsylvania case of Butler *v.* Lehman.

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[1] Globe, pp. 352–357.

[2] Journal, p. 178.

[3] Second session Thirty-seventh Congress, House Report No. 6; 1 Bartlett, p. 353; Rowell's Digest, p. 172.

The prima facie title to the seat had by the House been given to Mr. Lehman, and while this portion of the case presented unusual features, the committee did not consider it proper to reopen the question of prima facie right after the House had decided it.

The sitting Member, on the face of the corrected returns on which the certificate had been issued, had a plurality of 132 votes.

The contestant denied the correctness of these returns, and attacked them on two grounds.

The committee dismiss the first ground, saying:

> It is shown that the return from the eleventh division of the Second Ward, which gave Mr. Lehman 210 votes and Mr. Butler 31 votes, was never signed by the judge, as required by law. (See Brightly's Annual Digest, sec. 33, p. 1096.) If this return should be rejected on account of said informality it would make a difference in favor of the contestant of 179 votes, and would elect him. But the committee are of opinion that the votes as returned were really cast for the parties named, and that the objection is a mere technical one that ought not to prevail.

The second objection urged by the contestant is the one on which the issue was joined and on which the decision of the case turned.

The objection was that in certain wards and divisions of wards in the district, by reason of fraudulent action of the election officers, the returns did not give a true statement of the actual votes cast; and the contestant asked a recount of the ballots. The law of Pennsylvania provided for such a recount, as follows:

> As soon as the election shall be finished the tickets, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks shall all be carefully collected and deposited in one or more of the ballot boxes, and such box or boxes being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot boxes, shall, within one day thereafter, be delivered, by one of the inspectors, to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such election.

The recount took place in the presence of both parties to the contest, and showed a gain of 167 votes for the contestant, thus giving him a plurality of 35 votes. This gain was found in the boxes of three divisions—one in the Third Ward, another in the Second Ward, and the third in the Fourth Ward. The changes in no two of these three divisions were large enough to destroy the plurality of the sitting Member. It was therefore necessary to establish the verity of the recount in all three divisions.

The sitting Member objected to the validity of the recount on two grounds:

> First. That the ballot boxes were not sufficiently identified as belonging to the divisions alleged.
> Second. That the boxes had been opened and contents changed before the recount took place.

The minority of the committee urged in behalf of this contention of the sitting Member that the primary returns of votes made under State authority were prima facie evidence of their legality, of the number of votes cast, and the rights of the respective candidates. It was necessary to inquire whether the testimony presented by the contestant was sufficient to overcome the legal effect of the returns. The rule as to presumptive evidence was that no person in the absence of criminative

proof should be supposed to have committed any violation of the criminal law. The minority say:

It seems, then, as we understand the law, that the contestant might be justly and properly held to prove the truth of his charges against the election officers, not merely by the weight of evidence, as in civil cases, but beyond a reasonable doubt. The only testimony, as we have seen, that tends to establish their guilt is the recount of the ballots. Taking into view the difficulty of identifying the boxes, the manner in which they were kept, the time that had elapsed before they were opened, had those officers been on trial under an indictment for the offense, with no other testimony against them, it is a matter of grave doubt if this evidence, standing unsupported as it does, would have been sufficient to have put them upon their defense. The testimony is circumstantial, and only one circumstance, unsupported in any way. It may be well questioned whether this circumstance, standing as it does alone, can justly be regarded as affording evidence of higher nature than what is technically known as "a slight presumption of guilt," which, it is said, "may excite suspicion, but is not proof; nor does it change the burden of proof." In order to a successful prosecution of those persons in the case supposed, the testimony against them should not only be such as to countervail the presumption of innocence, which the law itself makes evidence for the accused in all prosecutions for crime, but also the still stronger presumption with which it fortifies and guards the official doings of its own officers. It is not enough, in such cases, that the testimony tends even strongly to establish the guilt of the accused, but that guilt must be shown to be inconsistent with any reasonable supposition of innocence.

The minority of the committee also dwelt upon the abuses and evil consequences which must result from the reopening of ballot boxes, except under stringent and well-understood rules.

As to the first objection of the sitting Member, the majority of the committee admitted that, so far as identification was concerned, there was much difficulty in identifying to what division a ballot box belonged until it had been opened. Then the papers directed by law to be placed in the ballot box would identify it as to the division to which it belonged, while the ballots themselves would show at what election they had been cast. But such tests, as well as a process of excluding the rem.g.remaining boxes in each ward, which were identified, convinced the majority of the committee as to the identity of the boxes containing the ballots which were recounted.

The minority of the committee made the point that the election officers, whose testimony as to the question of identity would have been the best in the case, were not called at all by the contestant and afterwards when called by sitting Member were unable to identify them, and further testified that if the boxes were the same the votes taken from them on the recount were not those put in them by the officers on the night of the election. The minority strongly contended that the facts did not show a sufficient identification of the boxes.

As to the second objection, that the boxes had been opened and the contents changed before the recount, the majority of the committee say:

The contestant produced these boxes from their legal and rightful custodians, sealed up, and in the same apparent condition they were in when left with the alderman. Under these circumstances the burden of proving them to have been tampered with properly rests on the respondent; but no proof upon this point was submitted, except some testimony showing that some of the boxes were left in such a situation that it was possible for some unauthorized person to have meddled with them.

But there is no proof to render it probable that such was the case.

The respondent attempts to rebut the evidence afforded by the recount of the ballots, by calling the election officers who made the division returns to testify that those returns were correct; but in the opinion of the committee this testimony neither impairs the case of the contestant nor strengthens that of the respondent.

Officers who had declared upon their official oaths that returns made by them were true would not be likely to come into court afterwards and swear that they were false.

The committee have not deemed it necessary to determine whether the errors in the division returns, before mentioned, were the result of deliberate fraud or mistake on the part of the election officers, for the motive which actuated them is immaterial. It is enough that the returns in the divisions specified were false in fact, and that the contestant was thereby deprived of votes fairly and legally cast for him, enough to have elected him; of this the committee are fully convinced.

The minority, in accordance with the principle announced by them as to the character of evidence required to prove fraudulent acts on the part of the election officers, urged that the contestant had by no means shown, as they thought he should show, that the boxes had been so kept as to rebut any reasonable presumption that they had been tampered with. The minority quote, testimony to show that the boxes were not by any means kept with the care essential to preclude opportunity for fraud.

On January 16,[1] the report was debated at length, and on January 17,[2] the House, by a vote of yeas 77, nays 67, amended the resolutions proposed by the majority of the committee so as to declare the contestant not entitled to the seat and declaring the sitting Member elected and entitled to the seat.

The resolutions as amended were then agreed to without division. So the report of the majority of the committee was overruled.

848. The Pennsylvania election case of Kline v. Verre in the Thirty-seventh Congress.

Example of a general specification in a notice of contest which does not meet the requirements of the law.

Instance wherein the Elections Committee, after ruling a notice of contest insufficient, permitted contestant to specify orally.

The custody of the ballot boxes being suspicious, the House declined to set aside the returns on the strength of a recount.

On February 27, 1862,[3] the Committee on Elections reported on the Pennsylvania case of Kline *v.* Verre.

This case involved two questions: A preliminary one as to the sufficiency of the notice given by the contestant, and a question relating to the truthful ascertainment of the number of votes cast.

As to the preliminary question, the law of 1851 required of the contestant that he should "specify particularly the grounds upon which he relies in the contest." The committee say:

Did this notice specify particularly the grounds of this contest? It is proper to state that the contestant waived before the committee all grounds of contest, except such as may be found in the last clause of the tenth specification. The attention of the House is therefore called to this specification, and to the particularity of the grounds of contest which that clause in it contains. It is in the following words:

"10. The examination of the tally papers relating to said Congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot boxes in said Congressional district, together with a recount of all the ballot boxes in said district at said election, will show that you were not elected, and that I was elected."

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[1] Globe, pp. 365–375.

[2] Journal, p. 196; Globe, p. 379.

[3] Second session Thirty-ninth Congress, House Report No. 40; 1 Bartlett, p. 381: Rowell's Digest., p. 175.

Without subjecting this specification to the criticism that the last clause is inseparably connected with the first, so that the whole must be taken together and constitute but one allegation quite different in its meaning from any just interpretation of the last clause, if standing alone, suppose it were a simple allegation, standing alone, that "a recount of all the ballot boxes in said district will show that you were not elected, and that I was elected," in what just sense could it be said that such an allegation is a compliance with that provision of law which requires of the contestant to "specify particularly the grounds upon which he relies in the contest?"

The committee concluded unanimously that the notice was "in no just sense a conformity with the requirement of the statute." They say:

The question was thereupon presented to the committee, Shall parties contesting seats in the House of Representatives be held to conduct that contest according to the requirements of the statutes of the United States, or be permitted, without expense, to depart from and disregard the plainest provisions of those statutes in this regard, founded in the plainest principles of justice and fair dealing? Long before the statute was enacted parties to contested elections, both in England and this country, were held to a compliance with the same rule.—(Leib's case, Clark & Hall, 165; Luttrell *v.* Hume, 4 Doug. Elect. Cases, 25; Skerret's, 2 Pars., 509; Carpenter's case, 2 Pars., 537; Kneass's case, 2 Pars., 553.) Several of the cases here cited are from the State of Pennsylvania, and, so far as the local law of the State where this contest has arisen forms a rule for the guidance of the parties, are clear and decisive against the sufficiency of this notice of contest.

Therefore the committee unanimously came to the conclusion that the notice was in "no just sense a conformity with the requirements of the statute, or the well-settled rules which should govern in all contests of this kind."

To avoid all injustice, however, the committee allowed the contestant to specify and particularize orally. This was done by specifying precincts wherein mistakes were alleged to have been made and particularizing the effects of such mistakes in numbers of votes.

As to the second branch of the case, there was a question as to the recount of votes. The returned majority of the sitting Member was 22 votes. Contestant's allegations were that in certain precincts there was sufficient wrong counting of votes actually cast to overcome the majority returned. The law of Pennsylvania provided as follows:

As soon as the election shall be finished the tickets, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks, shall all be carefully collected and deposited in one or more of the ballot boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot boxes shall, within one day thereafter, be delivered by one of the inspectors to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such elections.

The committee found the case dependent on two considerations:

Were the ballot boxes produced the ones actually used at these precincts at the election contested? And did they contain untouched the ballots so cast? Indeed, it must be apparent to everyone that unless the committee could be satisfied of both identity and security they could not control and correct the sworn return by any subsequent count.

Upon the question of identity the committee have had little or no difficulty. It was testified in respect to each of the boxes under consideration by the alderman of the ward who resided nearest the precinct that he received the box from the election officers of that precinct on the night of the election as and for the ballot box used at that precinct, and each was so labeled when received. There was other

evidence tending to strengthen this. And the committee were left without doubt that the boxes produced were those actually used at these precincts.

Upon the question of security, whether these ballot boxes, when opened and recounted before the magistrates, were in the same condition as when sealed up by the election officers and delivered to the alderman on the night of the election, there was much conflicting testimony and much doubt.

An example of the doubt is shown by the following conditions developed in the testimony. The ballot box of one precinct had been at times in the custody of a man of bad reputation, a constable who had been convicted of extortion, and had been pardoned by the governor. This constable had let the box go into the possession of a person whom he did not know, the pretext being that it was to be taken to the magistrate. The committee therefore thought that ballots kept in such custody were not trustworthy evidence after three months, especially when the number of votes did not agree with the sworn return. In another precinct the box had been left in an unfastened closet, with no one to care for it, for three days and showed exterior and interior signs of having been tampered with, the condition of the tickets being especially suspicious. In a third precinct the box had never been sealed according to law or had been subsequently tampered with, and the ballots were in a suspicious condition.

The contestant claimed the benefit of 54 votes gained for him by the recount of the ballots in these three suspicious boxes, these votes being necessary to show his election.

The committee were unanimously of the opinion that he was not entitled to these votes, and reported resolutions to that effect and declaring the sitting Member entitled to the seat.

On March 4,[1] after some debate, the resolution declaring contestant not elected was agreed to, yeas 105, nays 13. The resolution declaring the sitting Member entitled to the seat was agreed to without division.

849. The Massachusetts election case of Sleeper v. Rice in the Thirty-eighth Congress.

Discussion as to the validity of an amended return under the law of Massachusetts in 1864.

A recount by the election officers at their own instance, and unimpeached by anything showing fraud, was sustained by the House.

A declaration of result in open ward meeting, under a State law, was held prima facie evidence of the result, but controllable by evidence.

On February 17, 1864,[2] the Committee on Elections reported on the Massachusetts case of Sleeper *v.* Rice. The title to the seat depended on the true number of votes cast in Ward 12 of Boston, there having been two counts, one of which showed 85 plurality for Mr. Sleeper and the other a plurality of 28 for Mr. Sleeper, a change sufficient to change the result in the district. The committee, whose report seems to have been unanimous, say:

It is necessary to a correct understanding of the merits of this controversy that the method of conducting elections in Massachusetts be known. Polls are opened in cities in each ward, and the election is there conducted by a board of ward officers, consisting of a warden, clerk, and five inspect-

[1] Journal, pp. 397, 398; Globe, pp. 1054–1062.

[2] First session Thirty-eighth Congress, House Report No. 23; 1 Bartlett, p. 472; Rowell's Digest, p. 187.

ors. The voting is by ballot, and every voter's name is found upon a check list. A part of these ward officers has charge of the ballot boxes and others the check list. When a voter approaches to vote, his name is fast found and checked on the check list, and he then casts his ballot in the box. At the close of the poll the result, after having been ascertained by the ward officers mentioned, is certified in blanks prepared for the purpose by a majority of those officers, publicly declared there before the adjournment in open meeting, entered upon the records of the board, and certified copies thereof delivered by him forthwith to the city clerk, who shall immediately enter them upon the city records. Certified copies of this record, after examination and other proceedings, which will be hereafter alluded to, and transmitted in the case of Representative in Congress within ten days to the secretary of the Commonwealth, and by him laid before the governor and council, who, as a board of canvassers, canvass the returns from the entire district, declare the result, and give a certificate of election to the person appearing to them to be elected.

In the present case the ward officers on the night of election, November 4, 1862, sent to the city clerk a certificate showing a plurality of 85 votes for Mr. Sleeper. And the mayor and aldermen certified the result in the wards of the district.

On November 11, seven days after, the ward officers of Ward 12 sent to the city clerk an amended certificate showing a plurality of only 28 for Mr. Sleeper. Thereupon the mayor and aldermen transmitted an amended certificate to the secretary of the Commonwealth. The committee say:

The governor and council received the amended return and gave the certificate as required by it to Mr. Rice. Upon the legality and truth of this amended return hangs this contest. In respect to it Mr. Sleeper claims, first, that it is illegal, because there is no law authorizing the ward officers to make an amended or additional return of this nature.

The law requires the result to be declared in open ward meeting, and this result never has been so declared, and can not therefore be accepted as the result; and because the mayor and aldermen have never, as required by law, passed upon this amended or additional return, or determined anything one way or the other based upon it, but only transmitted the same to the governor and council, with a hypothetical certificate of their own, of no force in law, and, secondly, that the amended return is not true.

Although the last proposition of Mr. Sleeper is the most important of all, lying at the foundation of all investigations of the committee, who entertain no doubt that the seat should be awarded to that candidate for whom the greatest number of legal votes were cut, however officers may have conformed to or disregarded the requirements of law in Massachusetts in declaring, certifying, or canvassing the votes after they have been so cast, yet the committee, before proceeding to a discussion of the evidence bearing upon the question of how many votes were actually cast at that poll, embraced in the second proposition of Mr. Sleeper, stop for a moment to consider the soundness of his first proposition. Is there any law authorizing the ward officers to make an amended or additional return of the nature of the one here made? The duty of the ward officers, as well as of the mayor and aldermen, in the premises is prescribed in chapter 7, section 16, of the general statutes of Massachusetts in these words:

"The mayor and aldermen and the clerk of each city shall forthwith, after an election, examine the returns made by the returning officers of each ward in such city, and if any error appears therein they shall forthwith notify said ward officers thereof, who shall forthwith make a new and additional return, under oath, in conformity to truth, which additional return, whether made upon notice or by such officers without notice, shall be received by the mayor and aldermen or city clerk at any time before the expiration of the day preceding that on which by law they are required to make their returns, or to declare the result of the election in said city; and all original and additional returns so made shall be examined by the mayor and aldermen and made part of their returns of the results of such election. In counting the votes in an election no returns shall be rejected when the votes given for each candidate can be ascertained."

In this clear and comprehensive section is comprised the whole law of Massachusetts upon the subject. By it a new or amended return is not only authorized, but required in certain cases—its language being: "Who shall forthwith make a new and additional return." Of course the new return

is to be different from the one already made, or it would be useless. It must, therefore, be different from the original declared result, for that is what the law requires, and is in the first return, excepting always the possible case of a clerical mistake in transcribing a declared result into a certificate, which can not embrace the whole scope of the section. This disposes of the objection that the result included in the second return has never been declared in open ward meeting, for if it had been so declared there would have been no occasion, except in the one improbable case stated, for a new return. The last clause in the statute renders immaterial also any defects of form in the first return, holding it sufficient when the true number of votes can be ascertained from it, and consequently requiring a new return only when the true number of votes had not been declared and certified already.

The committee therefore concluded that a "result declared in open town meeting" might be amended, and that the statutes of Massachusetts contained ample provision for the proceedings of the ward officers and mayor and aldermen of Boston in respect to this new and amended return.

The committee considered, however, that the most important branch of the case yet remained, viz: Did the new return "conform to the truth?" The committee therefore proceeded to go back to the return, and examine what was the actual vote cast in Ward 12 for Representative in Congress. It appeared that the count on election day showed a difference of 60 votes between the aggregate of votes for Representative to Congress and for governor and other officers. Inquiry as to this discrepancy induced the ward clerk to examine and compare the memoranda of the count. Finding certain discrepancies—

the ward clerk conferred with the former clerk of the ward and other friends, and then returned and examined by himself alone, and unbeknown to anyone else, the bundle of votes in his attic. Taking off the paper wrapper, but without untying the string around the middle of the bundle of packages, or removing the packages, he examined the votes in each package, took off the number of votes for Representative in Congress on each of the packages, and then restored them to their former place in the closet. In consequence of the conviction that an error bad been committed in counting, which this examination produced on his mind, he then procured a meeting of all the ward officers at his house on the following evening, when the votes were by them there recounted with great care, and the result as thus ascertained was embodied in the new or amended return, signed by all the ward officers, seven in number, four of them voting themselves for Mr. Rice, and three of them for Mr. Sleeper, sworn to by them all, forwarded to the mayor and aldermen, and by them transmitted to the governor and counsel within the time prescribed by law. In counting the votes at this time the ward officers took each of the small packages upon which the number of votes was marked, recounted it carefully, and checked the corresponding numbers upon paper K.

The committee say of this second count:

That this was the correct count of the ballots on the second count the Monday night after the election, no one disputes, and an examination of the evidence, with a sworn return of the seven ward officers, does not leave room for doubt. If, therefore, the ballots had not in the meantime been tampered with, the proof could not be made stronger that the true result had been reached. Upon this point there is not the slightest evidence calculated to awaken suspicion. The clerk of the ward, whose testimony is uncontradicted, and whose character appeared to be above reproach, testifies positively that the bundle recounted on Monday night contained all the votes cast on the day of election, and none others, in precisely the same condition as when tied up at the close of the polls; that he took them that night home with him, and put them in a trunk in a closet in his attic; that the trunk shut with a spring lock, the key remaining in the lock; that no person, to his knowledge, knew they were there but himself; that his own family consisted of a wife, confined all this time to her bed with sickness, an infant child, a nurse, an aunt visiting the family, and himself.

The committee present as part of their report facsimiles of two of the memoranda of the count, and show that, unless they are forged, they sustain the result of the

recount. The committee conclude that not only the corroborative testimony, but "the very sight of the original papers" shows how preposterous is the claim that they have been changed to produce the result.

The committee therefore concluded that "in the absence of a particle of testimony calculated to cast suspicion upon the fairness and truth of this recount," Mr. Sleeper was not entitled to the seat, and that Mr. Rice was entitled to it.

When the case was debated in the House on March 4,[1] the contestant, who was heard at length, impugned the integrity of the ward clerk and charged that he had prepared the memoranda and ballots to produce the results.

As to the doctrine that the result declared in open town meeting was res adjudicata, and past any examination by the House, Mr. Henry L. Dawes, of Massachusetts, chairman of the Committee on Elections, said:

> The Committee on Elections were of the opinion that no such rule exists in Massachusetts, or should govern us in the House of Representatives; that while they would put great reliance on that open declaration and regard it as prima facie evidence of the actual result, not to be controlled by any slight or suspicious evidence, nevertheless it is controllable, and to be controlled by evidence that will not admit of any reasonable doubt, so that the truth may be arrived at satisfactorily to fair and candid minds as to the actual result of the legal vote.

The House, without division, agreed to the resolutions reported by the committee.[2]

850. The Missouri election case of Knox v. Blair in the Thirty-eighth Congress.

The pleadings in both the notice and answer being bad, the committee condemned them but examined the case.

The judges of an election having joined in partisan and irregular conduct and testimony showing evidence of extensive fraud, the entire return was rejected.

The committee considered an issue covered by testimony admitted without objection, although not specified in the pleadings.

On May 5, 1864,[3] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, submitted a report in the case of Knox *v.* Blair, of Missouri.

The report, at the outset, after noting the specifications of the contestant and the answer of the sitting Member, says:

> The House will not fail to notice the extraordinary character of many of the allegations of both contestant and sitting Member, as well in the matter as in the manner of their presentation. For vagueness, uncertainty, and generality they are, in the opinion of the committee, without example, and seem to have been drawn in studious disregard both of the act of Congress and of all precedent. But as neither contestant nor sitting Member was in a situation to take exception to the substance or mode of the other's pleading, the committee were not called upon for a decision upon this point, but present the case as they find it upon the record. They do not feel at liberty, however, to permit these pleadings to pass into a precedent without recording the opinion that many of the allegations on both sides are bad both in substance and form.

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[1] Globe, pp. 942–949.

[2] Journal, p. 346; Globe, p. 949.

[3] First session Thirty-eighth Congress, House Report No. 66; 1 Bartlett, p. 521; Rowell's Digest, 190.

The minority, calling attention to the above criticism, used it as an argument against the conclusion of the majority, as to the Abbey precinct, saying:

The first section of the act of 1851 (9th Statutes, p. 568) requires that the grounds of contest shall be specified particularly in the notice of contest.

This is but the reenactment of the parliamentary rule; and the practice has been uniform under this to restrict the contest to the points presented in the notice; and the ninth section of the act declares all evidence illegal which does not bear on the specifications of the notice, by restricting the evidence to be taken to the specifications made in the notice. The only ground presented by the contestant, in connection with this precinct, is contained in his first specification, which is in the following words:

"First. That at least 400 illegal votes were cast for you at a precinct known as the Abbey precinct, in said district. That the persons voting had not been citizens or inhabitants of the State of Missouri for one year previous to said election; nor had they been residents of said district for three months previous to said election. Many of said voters were minors under the age of 21 years. A list of the voters whose votes are contested is annexed to and made a part of the notice."

It will not be pretended that this notice declaring the intention of the contestant to contend meant merely that the individuals named were not qualified voters, for one or the other of the reasons mentioned contains, either in form or substance, notice that it would be "contended by the contestant that the voting at this precinct was of such a grossly fraudulent character as to involve all concerned in it either in participation or passive permission, and to render it impossible to sift and purge the poll"—which the committee report to be the present ground taken by the contestant.

But in debate Mr. Dawes expressly stated [1] that the specification in regard to the Abbey precinct was more particular than usual. It actually set forth the names of the voters objected to, thus setting out the facts more precisely than any case occurring to his recollection under the law of 1851.

As to the merits of the contest, the most important issue arose as to this precinct of Abbey. The return from this precinct gave Mr. Blair 424 votes, Mr. Knox 41, and Mr. Bogy 11 votes. In the two Congressional elections before the one in question and in a judicial election since, the total vote had not in any case exceeded 140 votes.

There had been little if any change in the population of the precinct. Furthermore, of the 480 who voted at this election in 1862, 19 only voted in 1858, only 13 in 1860, and only 36 in 1863. Persons acquainted with the voters belonging in the precinct visited the polls during the day, but saw scarcely a person known to them among the hundreds crowding the place. By the law voters were allowed to vote in precincts where they did not live, the requirement of an oath being provided to prevent repeating. It was in evidence that soldiers, including paroled prisoners, voted in large numbers illegally. The committee say of this precinct:

The judges of the election at this precinct were (p. 69) Mr. Price, B. Hamerler, and Mr. Carpenter. Yet Carpenter, without authority of law, substituted in his place (p. 70) one Jerry Millspaugh during a portion of the day, who acted as judge while he electioneered for the sitting Member, and vice versa. The other two judges also forgot their duty as judges in their zeal for the sitting Member (p. 70). The polls at this precinct seemed to have been under the control of one Charles Elleard, an active partisan of the sitting Member, the owner of a race course near by, who destroyed the tickets for the other candidates (p. 70), put one man out of the room because he would not vote for the sitting Member, declaring "We have it our own way here to-day, "and, as he tore up the tickets, "Damn it, we don't want any such tickets around here" (p. 70).

Upon this proof of the manner of voting at the Abbey—the conduct of the judges in admitting illegal voters to cast their ballots in a body, without any evidence that they even administered to a single one the oath required by law of nonresidents of the district, themselves acting as partisans of the

[1] Globe, p. 2959.

sitting Member, and, against law, exchanging places with other partisans not authorized to act as judges; surrendering the control of the voting place to a violent partisan of the sitting Member, and at last achieving the astonishing result of polling nearly four times as many votes as were ever before or since polled at that precinct, from voters all strangers to long residents of the district—the contestant claims that the poll itself should be rejected.

When the result in any precinct has been shown to be "so tainted with fraud that the truth can not be deducible thereform," then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown.

The majority, in support of this action, cite the case of Blair *v.* Barrett.

The minority of the committee, as already indicated, raised the point that the action of the judges was outside of the pleadings, and that therefore the committee were going outside the specifications for the benefit of the contestant, although on a question of the admissibility of testimony the sitting Member had been held to the strict rule. In reply, it was argued during debate that the question of the conduct of the judges was properly considered, since it had been covered by testimony regularly presented and admitted without objection as a part of the case. The minority further denied the conclusions of fact by the majority, and the application of the precedent of Blair *v.* Barrett.

851. The case of Knox v. Blair, continued.

The Elections Committee held copies of muster rolls of a regiment prima facie evidence of the age of soldier voters.

Persons intending to vote fraudulently must be shown to have done so at some poll to justify corrections on their account.

The House revised the action of certain canvassers who had rejected polls for want of an abstract of votes.

The second question considered by the committee in their report related to two companies of the Thirty-second Regiment of Missouri Volunteers, who under the law voted in their camps. To prove illegal votes of minors and others the contestant offered copies of the muster rolls of the two companies for comparison with the poll booths to prove that minors and persons not qualified had voted for sitting Member.

The disposition of the votes affected by this comparison depended on a question as to the admissibility of the muster rolls as evidence. On this point the committee say:

The contestant offered what he alleged were copies of the muster rolls of these companies (pp. 200–203). The sitting Member objected to these muster-rolls and to all others offered by contestant, 37 in all, found between pages 199 and 297, for the following reasons: Because, first, they "are neither certified copies nor sworn copies, in any true sense of the word;" that the papers from which those copies purport to have been taken were not in the proper place of deposit, nor in the hands of the legal custodian, and that they are, in many instances, copies of copies. The testimony shows (p. 90) that the papers are copies of muster rolls found in the adjutant-general's office of the State of Missouri, made by the witness, and sworn to as true copies by him. The committee are of opinion that, inasmuch as these are muster rolls of regiments raised by the State of Missouri, and afterwards mustered into the service of the United States, the rule of the military service requiring one copy of these rolls to be deposited with the Adjutant General of the United States at Washington does not make either the copy deposited with the adjutant general of Missouri or that kept with the regiment copies of the one so deposited in Washington any more than that is a copy of either of them, but that either and each of them may be treated as an original, and the muster roll of the regiment for all purposes for which it is to be consulted as such, and the adjutant-

general of Missouri a proper custodian thereof. "Sworn copies" of papers are expressly recognized in the act of Congress providing for taking testimony in contested election cases. (Brightley's Dig., p. 255.) The committee, therefore, deemed these papers as properly authenticated. It was claimed by the contestant that these muster rolls were evidence of the following facts, viz, who were members of the regiment to which the rolls belonged, and what was the age and residence of the soldier enlisting. While, on the other hand, it was objected by the sitting Member that, if properly authenticated, still the rolls would be evidence of nothing except the facts required by law to be recorded in them, and that neither the age nor the residence of the soldier was required to be inserted upon the muster roll, and could not therefore be proved by it. The committee were of opinion that the law requires that the age of a soldier must be made known at the time of his enlistment; that by act of Congress (Stat. 12, p. 502) the oath of enlistment is conclusive against the soldier as to his age; and that the record of age made from the oath of enlistment upon the muster roll by the proper officer at the mustering in should be taken as prima facie evidence of the age of a recruit by third persons, especially by those who seek to avail themselves of the vote of such soldier. But the committee are of opinion that the muster roll is not evidence of the residence before enlistment of the soldiers whose names it bears. It is not of the slightest consequence to the recruiting service to know the residence of the recruit. The law does not require it to be ascertained, nor does the muster roll purport to give it, but only the place where the recruit "joined for duty and was enrolled." But it is known that recruits are constantly going from all parts of a State and from different States to favorite places of rendezvous, and there enlisting, so that the place where a recruit enlisted is no evidence of his residence.

While, therefore, the committee admit the muster rolls as evidence of what men compose a regiment, and of their age, they are still only evidence of those facts at the time the muster roll is made out.

But the committee are of opinion that a muster roll made out a long time before the day of election (November 4, 1862) is not evidence of the "true state" of a regiment at that time. Regiments are constantly changing. With many of them recruiting is all the time going on, and men are every day discharged. It can not, therefore, be safe to say that because a name is not found on a muster roll made out in 1861, that that person was not a member of the regiment November 4, 1862, when the election took place. They therefore rejected all the muster rolls offered as evidence of who did and who did not belong to the respective regiments on the day of election, excepting the following, viz, Company B, Thirty-second Regiment (p. 200), dated December 8, 1862; Company K, same regiment (p. 203); same date; Naughton's company, Twenty-eighth Regiment (p. 206), dated September 12, 1862; Company L, Tenth Cavalry (p. 209), dated October 28, 1862; Company B, Thirty-first Regiment (p. 212), dated August 28, 1862; and Captain Cain's company, Tenth Cavalry (p. 292), dated October 31, 1862. All these muster rolls, made so near the time of the election, were held by the committee to be prima facie evidence of what persons belonged to the respective regiments enumerated. So that if the name of a voter was not found upon these muster rolls it was incumbent upon the party claiming the vote of such a person as a member of one of these regiments to show that fact. But all the other muster rolls, bearing date from one year to a year and a half prior to the day of the election, were not deemed by the committee safe evidence of membership sufficient to be taken as prima facie. But all these muster rolls show the age of the soldier when he enlisted and the time of enlistment, and therefore of age one is as good evidence as another, and all are admitted as evidence to that extent, leaving each party at liberty to controvert them by other evidence.

In accordance with the principles enunciated above the majority purged the polls of various other regiments.

Another principle was involved in testimony offered by contestant to show that crews of men working on gunboats at Carondelet, a place 10 miles below St. Louis, had by direction of Mr. Eads, their employer, been led to vote illegally for Mr. Blair. The committee say:

But although these men set out for the avowed purpose of casting fraudulent votes, and were furnished with tickets by the foreman of their employer, and were carried from the poll in one district where the judge had become too particular for dishonest voters into this district under the guidance of the employer of Mr. Eads, who distributed among them votes for Mr. Blair as they went, yet these men are traced to no poll in St. Louis. Their names are not given, so that no examination of the poll list will

enable the committee to detect them. However strong the tendency of this testimony, it lacks this link, and the committee can not say how many of them voted, nor at what poll they voted, nor for whom. The committee have, therefore, rejected no votes from any poll on account of gunboat men from Carondelet.

Another principle was discussed in connection with certain poll books rejected by the official canvassers. The committee held as follows:

In the opinion of the committee, all of the polls which were rejected for want of "an abstract of votes" were erroneously rejected. The abstract is simply a computation or casting up of the votes, not required by law, and, if erroneously done, to be corrected. The name of each voter and the person for whom he voted is given in each case, and the computation left to be made is not only perfectly easy, but is what is being done all the way through this investigation. The committee have therefore taken into the count all polls rejected for this reason.

The majority of the committee, acting in accordance with the above principles, purged the polls, finding a plurality of 49 votes for the contestant. Therefore they reported resolutions that Mr. Blair was not elected, and that Mr. Knox was elected.

The minority dissented from the conclusions of the majority, contending that the evidence failed to overcome the title of the sitting Member.

On June 10, 1864,[1] the report was debated, though not at great length, the debate developing inaccuracies in the minority views.

The resolution declaring Mr. Blair not entitled to the seat was agreed to, yeas 82, nays 32. The resolution seating the contestant was then agreed to without division.[2]

852. The election case of Todd v. Jayne, from the Territory of Dakota, in the Thirty-eighth Congress.

By answering a notice of contest served before the declaration of the result the sitting Member was held to have waived the informality.

Testimony taken before justices of the peace was admitted, although the sitting Delegate had protested that they were not legally authorized and had declined to attend.

The House declined to receive a deposition taken in violation of the law of 1851, although bearing vitally on the turning point of the contest.

On May 24, 1864,[3] the Committee on Elections reported on the question as to the final right to the seat in the case of Todd *v.* Jayne, of Dakota Territory. The question of prima facie right had been disposed of in a preceding report.

In the question as to final right certain preliminary questions were passed on by the committee, of such importance that the final decision may be said to rest on one of them to a large extent.

The result turned on the vote of Kitson County. An affidavit tending strongly to impeach that vote was presented by sitting Member. The committee say in regard to that affidavit:

Technical objections were raised at the outset, on both sides, that the proceedings had not conformed to the statute of 1851 concerning contested elections. The contestant insisted upon the exclusion

[1] Globe, pp. 2854–2861.

[2] Journal, p. 781; Globe, p. 2861.

[3] First session Thirty-eighth Congress, House Report No. 99; 1 Bartlett, p. 555; Rowell's Digest p. 193.

of the deposition of Joseph L. Buckman (p. 154), because taken after the time prescribed by the statute for closing testimony. By the statute, sixty days from December 15, 1862, the time of the answer, is allowed for taking depositions, which in this case would be February 15, 1863, and they are to be taken in the Territory by some magistrate named in the statute and resident of the Territory. This deposition was taken March 11, 1863, in the District of Columbia, before one of the judges of the orphans' court of this District. The law is explicit, that, while the House can authorize the taking of depositions after the expiration of the time fixed by statute, yet without such authority the evidence must be excluded. The House has heretofore, in another case, that of Knox *v.* Blair, instructed the committee to exclude deposition—that of N. S. Constable, taken in this city under similar circumstances—and this deposition was therefore excluded.

The minority of the committee call attention to the fact that technical requirements had been waived in respect to other features of the case, and say:

Can it be that the House, adhering to the letter of the law as to the time and officer before whom testimony shall be taken, when the act itself is only declaratory and does not forbid the taking of testimony at another time and before another officer, will exclude testimony which exposes this fraudulent and fictitious Pembina vote, and then admit the contestant to take his seat under it? Has not every Member at all acquainted with the Red River country a general knowledge that there could be no such vote there as has been certified to? Without this fraudulent vote the contestant has no claim to the seat, as the report of the majority admits, and not only admits this but shows by the computation of the majority, as given therein, that the sitting Member is entitled to retain his seat.

As to the second preliminary question the majority say:

While the statute requires the contestant to serve his notice of contest upon the sitting Delegate within thirty days after the result of the election has been declared by the board of canvassers, the notice in this case was served upon him before the result was declared. The notice was served November 17, 1862, and the result proclaimed November 29, 1862. The answer of the sitting Delegate, which was upon the merits, and without notice of this objection, was served upon the contestant December 15, 1862. And the committee are of opinion that this was a defect which the sitting Delegate could waive, and that by answering after the result had been proclaimed, and within the time when a new notice of contest could have been served, without availing himself of the objection and proceeding to take the testimony, he had waived the right to object to it at the hearing.

The minority objected to this:

At the outset the question arises, Is there any law prescribing the mode of obtaining evidence in the case of contested elections of Delegates from Territories? Manifestly not, if the act of February 19, 1851, is to receive a strict construction, for it applies only in terms to the "contest of an election of any Member of the House of Representatives." That a Territorial Delegate has no vote, and is not, strictly speaking, a Member of the House of Representatives, is known to all. If, however, the act of February 19, 1851, is by analogy to be held as governing in the contest of a seat by a Territorial Delegate, the provisions must be complied with. That they were not complied with by the contestant in this case is admitted by the majority report, which states, "that while the statute requires the contestant to serve his notice of contest upon the sitting Delegate within thirty days after the result of the election has been declared by the board of canvassers, the notice in this case was served before the result was declared." The report, however, proceeds to state that "the committee are of opinion that this was a defect which the sitting Delegate could waive, and that by answering after the result had been proclaimed," etc., "he had waived the right," etc. Without controverting this position it is difficult to perceive why, if the contestant is to be permitted to avail himself of a notice not strictly in accordance with the statute, the sitting Delegate should not have the like liberality extended to him in relation to a deposition taken on notice to the contestant, when the contestant was present listening to the examination and consenting to an adjournment for the purpose of completing it.

The third preliminary question is thus disposed of by the majority of the committee:

The sitting Delegate further objected that the testimony of contestant was not taken before magistrates authorized by the statute to take testimony. The depositions appear to have been taken before

two justices of the peace, residents of the Territory, who are only authorized to take them when there are none of the other officers mentioned in the statute in the Territory. The statute requires that whoever takes the depositions shall be a resident of the Territory, and the only persons before whom the sitting Delegate claims the depositions should have been taken were the Chief justice of the Territory, P. Bliss, and associate justice, J. L. Williams. Of their residence in the Territory, the evidence is (pp. 15, 19, 21, 27, 37, 82), that their families have never been domiciled in the Territory, but, since their appointment at Sioux City, in Iowa, their post-office matter is sent to that city, where they reside, only coming into the Territory to hold their courts, and then returning to their families in Sioux City. Judge Bliss, who was in the Territory when the notice to take the first deposition was given, which was given to take them before him, "or before some other person duly qualified to take said testimony," on Friday, the 6th day of January, 1863, writes to the attorney a note (p. 10), in which he says, "I will open the examination and remain as long as I can—at least till Friday evening." The committee were of opinion that the two justices of the peace, residents of the Territory, were competent to take the depositions.

Against the above the minority urged:

There is, however, a more serious objection to all the contestant's testimony. It is all ex parte, and taken before justices of the peace. By the third section of the act of Congress, the party wishing to take testimony may apply to "any judge of any court of the United States, or to any chancellor, judge, or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officers shall reside, within the Congressional district; "and by a subsequent section, the twenty-third, it is provided that in case no such magistrate as is by the third section authorized to take depositions shall reside in the Congressional district, it shall be lawful to apply to two justices of the peace. In this instance the contestant gave notice of his intention to take testimony before the chief justice of the Territory, but subsequently went before two justices of the peace. The sitting Delegate protested against the right of the justices of the peace to take the testimony, and never appeared before them. The contestant seeks to show, by testimony, that Judge Bliss, the chief justice of the Territory, resided at Sioux City, Iowa, and not within the Territory of Dakota; but the notice which he gave to take the testimony states: "It is my intention to examine witnesses before Hon. P. Bliss, chief justice of Dakota Territory, the said chief justice being a resident within and for the Congressional district, Territory of Dakota, thereby admitting his presence and competency to act. A copy of said notice is hereto annexed. Besides, the papers show that Judge Bliss, at the instance of contestant, issued subpoenas for witnesses, was present at the time the testimony was about to be taken, and proposed in writing to the contestant to enter upon the examination. The contestant, however, preferred, contrary to law, to proceed before two justices of the peace. That Judge Bliss was, in contemplation of law, a resident of the Territory is manifest from the fact that he had been in the Territory holding the courts, and was then present.

853. The case of Todd v. Jayne, continued.

Professional men within the precinct because of work on contract and not having homes therein were held not to be residents.

It being impossible to ascertain the true vote because of fraud on the part of the officers, the returns were rejected.

These preliminary questions being determined by the committee, the questions as to the election itself caused a division of the committee only as to the vote of Kitson County, which determined the result.

In Yankton County the committee rejected 9 votes, indisputably cast for the sitting Member, because cast by nonresidents, principally surveyors employed under contract and leaving the State when the contract expired, their return depending on new contracts and not on homes in the Territory. The committee did not deem such residents within the meaning of the law.

In Bon Homme County the vote had been rejected by the Territorial canvassers, and the committee approved this rejection. The United States marshal had arbitrarily excluded from the polls a man who had been appointed judge; the board

of election officers had manifestly been constituted to favor fraud, and when watchers at the polls confronted them with evidence of fraud they rushed from the poll room, abandoning the election papers to the crowd, who proceeded to hold a new election.

In Charles Mix County the returns were rejected by the Territorial canvassers. The committee decided that of the rejected votes 62 should be allowed to the sitting Delegate and 7 to the contestant. The rejected votes were cast by Iowa soldiers and half-breeds not entitled to vote.

At Brule Creek precinct, as admitted by one of the election judges in his testimony, the judges met on the night preceding the election at a place not the legal place of election, and received the votes of persons not qualified voters. They took this box, with the fraudulent votes in it, to the regular place of election, and there received the legal votes. A clerk of election who refused to add the fraudulent votes with the legal ones, resigned and another was put in his place. The committee say of these returns:

> The committee are of opinion that it would be a disgrace to receive a return of votes from persons assuming to act as judges and guilty of such practices in office as the testimony and the foregoing unblushing confessions disclose, and submit whether such "judges" have or not added to their other crimes that of perjury in taking the following oath, which they have certified that they have taken:
>
> "We do solemnly swear that we will perform the duties of judges according to law and the best of our ability; that we will studiously endeavor to prevent fraud and deceit in conducting the same."
>
> The committee, therefore, reject the entire vote thus returned from this precinct.

The return of Kitson County was received at the office of the Territorial secretary, after the canvass had been completed, and was sufficient to change the result proclaimed after that canvass. The committee say:

> The committee were of opinion that the arrival of these returns in the secretary's office a few days after the canvass was completed was not of itself sufficient ground for their rejection. The sitting Delegate objects to the counting of this return for two reasons. First, that the vote is fraudulent and fictitious. Second, that the territory included in the precinct at which this vote was cast "is situated wholly in the Indian country; and though within the geographical, it is, by the act of Congress organizing the Territory of Dakota, without the political limits of said Territory."

The objection that the precinct was in the Indian country the committee find not sustained by law. As to the charge that the vote was fraudulent and fictitious the committee found it sustained by only one witness, whose testimony had not been admitted for reasons already stated. Therefore the committee counted the vote of this county, 125 for contestant and 19 for sitting Member, and thereby found a majority of 99 votes for the contestant. Accordingly they reported resolutions that sitting Member was not elected, and that contestant was entitled to the seat.

On June 10 and 11[1] the report was debated at length in the House. There was a strong feeling that the Kitson County vote would have been impeached had the excluded testimony been admitted, and the following substitute amendment was offered to the resolutions of the committee:

> That the election in the Territory of Dakota for Delegate was attended with so much illegality and fraud that neither William Jayne nor J. B. S. Todd is entitled to a seat in this House as such Delegate, and the seat of the Delegate from that Territory is declared vacant.

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[1] Globe, pp. 2861, 2882–2892.

This amendment was disagreed to,[1] yeas 57, nays 66. Then, after dilatory proceedings, the resolution declaring Mr. Jayne, the sitting Member, not entitled to the seat was agreed to, yeas 92, nays 1; and then the resolution seating Mr.Todd, the contestant, was agreed to, yeas 64, nays 31.

854. The Missouri election case of Lindsay v. Scott in the Thirty-eighth Congress.

The law of the State requiring a voter, on pain of disqualification, to take an oath of loyalty, votes cast by unsworn voters were rejected.

Where a State law declared that "no ballot not numbered shall be counted," the House sustained the rejection of ballots not numbered.

Ballots being regularly numbered and counted and the vote entered on the poll book the return stood, although the ballots were afterwards destroyed.

On June 20, 1864,[2] the Committee on Elections reported in the case of Lindsay *v.* Scott, of Missouri. In this case, the committee being unanimous, the poll was purged by the committee in accordance with the following conclusions:

The State of Missouri having been torn by civil dissensions incident to the war, on June 10, 1862, the State convention had adopted an ordinance prescribing an oath of loyalty as a qualification for voters and the judges and clerks of all elections. The contestant alleged that in numerous precincts the oath was not administered. The committee say:

> A neglect or refusal to take the oath disqualified the voter by the express language of the ordinance; and hence wherever it appears that the election was conducted by the judges without having the oath administered to the voters, or wherever the voters were permitted to vote without having first taken the oath, the committee have felt bound, by the express provisions of the ordinance, to reject all such votes as illegal and void, no matter for whom they were cast.

The committee state thus a second rule by which they proceeded:

> By an act of the general assembly of the State of Missouri, approved March 23, 1863 (Laws of Missouri, 1863, p. 17), certain amendments were made to the laws of that State in regard to elections, and among other things ordering the elections to be by ballot and to continue for one day only. It also provided that the judges of election should "cause to be placed on each ballot the number corresponding with the number of the voter offering the same" and that "no ballot not numbered shall be counted." The contestant in his notice alleges that in several of the townships and election precincts this provision of the law was wholly disregarded, and therefore that the votes so cast should be rejected.

The committee comment on the fact that the statute in this respect is clear and explicit, expressly prohibiting the counting of such votes by the judges of elections.

In Cape Girardeau County the county clerk omitted from his abstract which he certified to the secretary of state the votes of certain soldiers which had been given viva voce. The clerk certified that he omitted the votes because he was uncertain as to their legality. The committee found that the votes were legally cast and counted them.

Contestant objected that the votes of Iron Township, in Iron County, were illegal because the ballots were destroyed; but as they were regularly numbered

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[1] Journal, p. 790; Globe, p. 2891.

[2] First session Thirty-eighth Congress, House Report No. 117; 1 Bartlett, p. 569; Rowell's, Digest, p. 195.

and counted, and the vote indorsed on the poll books before the destruction of the ballots, the committee declined to reject the votes.

The committee also say:

> The sitting Member has raised numerous objections to the sufficiency of the allegations in contestant's notice, both as to matters of form and substance and to the admission of testimony under the specifications, some of which are obviously informal and frivolous; but the committee have not deemed it important to examine or decide the points thus made, or to consider the objections raised by the sitting Member to some of the votes cast for contestant, as the conclusion to which the committee have come on the case made by the contestant renders it unnecessary.

Purging the polls in accordance with the principles set forth the committee found that there still remained to Mr. Scott, the sitting Member, a plurality of 61 votes. Therefore the committee recommended a resolution declaring Mr. Scott entitled to the seat.

On June 24,[1] without debate or division, the House agreed to the report.

855. The Missouri election case of Boyd v. Kelso in the Thirty-ninth Congress.

In 1865, in a case wherein sitting Member had, by reason of absence on military duty, failed to receive notice of contest, the House gave further time for taking testimony.

A contestee by answering without taking exceptions waives objections to the sufficiency of the notice of contest.

A second notice of contest served after the expiration of the time fixed by law was disregarded.

Objection having been made by contestee to evidence on points not put in issue by contestant's notice, the evidence was rejected.

The contestant must overcome contestee's prima facie right, invalidate the latter's title, and show himself entitled to the seat.

On December 19, 1865,[2] Mr. John R. Kelso, of Missouri, rising to a question of privilege, asked for an extension of time in taking testimony in the contest for his seat instituted by Mr. S. H. Boyd. Mr. Kelso explained that in his absence on military duty he had not received notices of contest, and had failed to take testimony within the time limit prescribed by the law. On motion of Mr. Henry L. Dawes, of Massachusetts, the subject was referred to the Committee on Elections.

On December 20[3] the committee reported that they had not examined the question particularly because there had been an agreement between the parties. Therefore the committee reported the following resolution, which was agreed to by the House:

> *Resolved,* That in the matter of the contested-election case of Hon. Sempronius H. Boyd against Hon. John R. Kelso, it is hereby ordered that the sitting Member be allowed fifty days from and after the passage of this resolution for the purpose of taking testimony, and the contestant, if he choose, thirty days thereafter for the purpose of taking testimony in reply thereto; and that in all things, except the extension of time herein prescribed, both parties be required to conform to the provisions of the statute of February 19, 1851, in relation to contested elections in this House.

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[1] Journal, p. 889; Globe, p. 3241.

[2] First session Thirty-ninth Congress, Journal, p. 88; Globe, p. 81.

[3] Journal, p. 96; Globe, p. 98.

On June 25, 1866,[1] the Committee on Elections reported on the final right to the seat.

The most definite principles presented in this case arise in relation to preliminary questions. These are set forth in the statement of the case in the report:

> The election here contested was held on the 8th day of November, A. D. 1864. It appears that the said Fourth district is composed of some 21 counties. The contestant, on the 9th day of January, A. D. 1865, served on the sitting Member a notice of intention to contest his right to the seat as a Representative of the said Fourth Congressional district, and setting forth the grounds of contest.
>
> The said specifications are very general, vague, and indefinite, but, so far as can be gathered from them, they raise some objections to the regularity of the election, and the legality of some of the votes at some of the election precincts in the counties of Barry, McDonald, Newton, Jasper, Dade, and Polk, which are included in said district, but state no objections to the election or the votes cast at the election precincts in any of the other counties of the district. The vote, however, of Capt. Stephen Julian's company, of the Second Regiment Missouri Artillery, stationed at St. Louis, was also objected to or questioned in said notice.
>
> The sitting Member filed his answer to said notice of contest, denying the several specifications and allegations of contestant, and alleging certain objections to the election, and to the legality of the votes cast for contestant at various precincts in different counties of the district.
>
> A further formal notice of contest appears * * * purporting to have been given by the contestant, and accompanied by a certificate of a deputy sheriff setting forth that he served it on the wife of the contestee on the 21st day of March, 1865, of which notice, however, no other proof of service appears, and no notice seems to have been taken of it by the contestee, and he, on the hearing, objected to its consideration in the case, it not having been given within the time prescribed by the act of February, 1851; and also objected to the first, second, ninth, tenth, eleventh, and twelfth specifications in the original notice of contest for insufficiency in not specifying with particularity the grounds of contest, as required by said act. But as no objection to the sufficiency of the first notice appears to have been taken in the answer of the contestee, it is probable that, according to the precedents in such cases, the objection to the sufficiency of the fast notice, so far as the contestee is concerned, may be considered to have been waived.
>
> The second notice not having been given in time, and not appearing by any proof to have been served as required by law had it been given in time, and no application having been made or leave granted to the contestant to amend his notice after the expiration of the time fixed by the law for serving the same on the contestee, it is not properly in the case, and can not therefore be considered in this investigation; though, from a casual examination of its contents, the committee think that if it had been admitted and considered it would not probably have materially affected the result.
>
> The contestant not having raised any objection in his notice to the election at any of the precincts in the several counties of the district, other than in the counties of Barry, McDonald, Newton, Jasper, Dade, and Polk, any evidence he may have submitted as to the votes cast at the several election precincts in such other counties is manifestly irrelevant and inadmissible; and the contestee having also objected to such evidence on that account, it is not considered in the case. The evidence, however, is in itself very defective, so that its rejection can not work any serious prejudice.

As to the merits of the case, the report says:

> The sitting Member having the certificate of election, prima facie has been legally elected, and it is for the contestant to overcome this prima facie right, invalidate the contestee's right to the seat, and show himself entitled thereto.

The report thereupon proceeds to analyze the testimony, showing it to be inadequate to the requirements of the above-mentioned principle. There was, for instance, no evidence before the committee to show what votes or returns were included in the final canvass in the office of the secretary of state of the votes for

[1] House Report No. 88; 2 Bartlett, p. 121; Rowell's Digest, p. 206.

Representative to Congress in this district. The committee go on to examine in detail various specifications of the contestant, finding so much insufficiency in testimony that they came to the conclusion without dissent, that Mr. Kelso, the sitting Member, was entitled to his seat.

On June 28,[1] without debate or division, the resolution reported by the committee was agreed to.

856. The Michigan election case of Baldwin v. Trowbridge in the Thirty-ninth Congress.

May a State legislature, in fixing times, etc., for elections, disregard the requirements of the State constitution?

Extent to which the House, in an election case, should defer to decision of a State court that a State law is void.

The State legislature, in fixing the place of election, may condition the place on the movements of soldier voters.

Discussion of the meaning of the word "legislature" in the clause of the Constitution relating to fixing the place, etc., of elections.

On February 5, 1866,[2] Mr. Glenni W. Scofield, of Pennsylvania, from the committee on Elections, reported in the case of Baldwin *v.* Trowbridge, from Michigan. This case arose out of the following facts:

> The constitution of Michigan contained the following provision: "No citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of 21 years, and has resided in the State three months, and in the township or ward in which he offers to vote ten days, next preceding such election."

A law passed by the Michigan legislature February 5, 1864, provided:

> That every white male citizen or inhabitant of this State, of the age of 21 years, possessing the qualifications named in article 7, section 1, of the constitution of the State of Michigan, in the military service of the United States or of this State, in the Michigan regiments, companies, or batteries, shall be entitled to vote at all the elections authorized by law, as provided in this act, and every such citizen or inhabitant shall thus be entitled, in the manner herein prescribed, whether at the time of voting he shall be within the limits of this State or not.

Under this act many votes were cast by soldiers outside the State. If these votes were legally counted Mr. Trowbridge was elected and entitled to his seat. If they were not legally cast and counted, Mr. Baldwin, who had a majority of the home vote, was entitled to the seat.

The power of the legislature, to act in conflict with the organic law of the State was derived, if at all, from Article I, section 4, of the Constitution of the United States:

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof, etc.

Mr. Scofield, in the report, argues that the word "legislature" as here used does not mean the legislative power, but "the legislature eo nomine, as known in the political history of the country," since if the framers of the Constitution had meant

[1] Journal, p. 920; Globe, p. 3460.

[2] First session Thirty-ninth Congress, Globe, p. 814; 2 Bartlett, p. 46; Rowell's Digest, p. 200; House Reports Nos. 13 and 14.

State organic conventions, they would have chosen a word less liable to misconstruction. The report goes on—

> It is also apparent, from the manner in which this word is used in other parts of the instrument, that its framers recognized a wide difference between a continuing legislature and a convention temporarily clothed with power to prescribe fundamental law. Article V provides that Congress "shall call a convention for proposing amendments * * * on application of the legislatures of two-thirds of the several States." Also, that amendments shall be valid when "ratified by the legislatures of three-fourths of the several States, or by conventions of three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." Article VII provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."

The report calls attention to the fact that the convention closed its labors with a resolution which still further bears out this idea, as also is seen by other instances cited in the report:

> In Article I, section 2, the words of the Constitution are "the electors in each State shall have the qualifications requisite for the most numerous branch of the State legislature." Did anybody ever hear of a constitutional convention, in the history of this country, composed of two houses? Article I, section 3, provides that "the Senate shall be composed of two Senators from each State, chosen by the legislature thereof." In Article II, section 1, it is said "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, etc. In section 8 of Article I, "the consent of the legislature of a State" is required before the United States can purchase places for forts, etc. Again, in Article IV, section 4, is said that, "on application of the legislature, or the executive (when the legislature can not be convened), Congress shall protect each State against domestic violence." It will hardly be claimed that a constitutional convention could perform the duties thus conferred upon the legislature; much less that it could forbid the legislature eo nomine from discharging them after its own dissolution.
>
> But the legislation of Michigan may be sustained as against the constitution of that State, even if the word legislature is to be taken in its most enlarged sense. Whatever power the convention of that State possessed to prescribe the places of holding elections for Representatives in Congress was derived, not like its other powers, from the people, but from the Constitution of the United States, and that, too, because it was a constructive legislature. The power conferred is a continuing power. It is not used up when once exercised, but survives the dissolution of the convention. The words of the Constitution are as potent then as before, and if there is any legislative body in the State that can be properly called a legislature, they appertain to it as strongly as to any prior legislative body. They do not authorize any convention or legislature to tie the hands of its successors. The people authorize a convention to do that where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States. This view of the case entirely harmonizes what was at first supposed to be a partially adverse precedent in the case of Shiel *v.* Thayer, from the State of Oregon.

The report further controverted the position that a question of the qualification of voters was involved, since the place of holding elections was not one of the electoral qualifications.

In the course of the debate [1] Mr. Henry L. Dawes, of Massachusetts, chairman of the committee, stated that he agreed in the conclusion that Mr. Trowbridge was entitled to the seat, to which the committee had arrived, but did not wish to indorse the reasoning of the report. It seemed to him that the legislature, in fixing the place, must act in accordance with its organic restrictions. But it did not seem to him that the law of Michigan was antagonistic to the Constitution, since the latter

[1] Globe, P. 821.

instrument nowhere provided that the voter must be personally present in the township or ward of which he was a resident. The mode and manner of his depositing his vote might be prescribed by the legislature without violation of the Constitution.

Mr. S. S. Marshall, of Illinois, submitted minority views, in which Mr. William Radford, of New York, concurred. The minority views, after stating the case, say:

> The supreme court of Michigan, in a case arising out of the identical election out of which this contest has arisen (the case of The People ex rel. Daniel S. Twitchel *v.* Amos C. Blodgett) have construed this provision of their constitution to mean that the elector shall be personally present, in the township in which he resides, on the day of election, and there in person present his ballot at the place of voting, and that the act of the legislature of February 5, 1864, "is in direct conflict with the constitution, and for this reason void." This cue was very thoroughly discussed and considered by the court, the judges all giving separate opinions, and it seems to me impossible to read the case without arriving at the same conclusion. This is the highest and most authoritative exposition of that provision of the State constitution that can be given. The supreme court of Michigan is the most authoritative expounder of the constitution and laws of the State, and all other tribunals, including even the Supreme Court of the United States itself, are bound to follow and abide by the construction which the State court has placed upon their own constitution.

In the debate it was contended that this decision of the supreme court was rendered in the case of a State officer, and had no reference to the election of members of Congress.

The minority further argue against the definition of "legislature" contained in the report:

> The "legislature" of a State, in its fullest and broadest sense, signifies that body in which all the legislative powers of a State reside, and that body is the people themselves, who exercise the elective franchise, and upon their power of legislation there is no limitation or restriction, except such as may be found in the Federal Constitution, or such as they may themselves provide by the organic law of the State. When they assemble in convention, which in large communities is from necessity done by the agency of delegates or representatives of the people, the whole legislative power of the State is then vested in such convention. It can abolish, or in whole or in part abrogate, the proceedings of "the general assembly" or "legislative council" or "general court," or whatever may be the designation of that subordinate body in which is usually lodged a portion or residuum of the legislative power of a State. Indeed, the people of a State might provide for the periodical assembling of their convention, which would exercise and perform all legislative powers and duties without the intervention of that body of limited and restricted powers, popularly called a "legislature," but which in the constitutions of most of the States is called by some other name. It is variously designated a "general assembly," a "legislative council," a "general court," and the like, and is nowhere understood to hold in its grasp all the legislative powers of a State. * * * This secondary or subordinate body is the creature of the organic law of the State, owes its existence to it, and can rightly do nothing in contravention of its provisions. * * * Indeed, from the adoption of the Federal Constitution until this time, it was never before contended, as far as I am informed, that the clause in question conferred upon that body in a State in which wan reposed that residuum of legislative power, not exercised by the State convention, power to act utterly independent of, and in utter disregard of, the State constitution, by virtue of which alone it has any existence. The people have everywhere supposed that they had the power to fix a limitation upon the action of their legislature, in determining the times, places, and manner of holding elections for all offices.

The minority views further cite the cases of Shiel *v.* Thayer and Farlee *v.* Runk, in support of the contention.

The minority views further assail the law of Michigan in its relations to the Federal Constitution:

But the act of the Michigan legislature (by virtue of which the votes were cast outside of the State that it is proposed to count for the sitting member) does not prescribe the place or places of voting, and consequently the votes were not cast in pursuance of any competent authority. The provision of said statute is as follows:

"SEC. 7. At the elections herein provided for a poll shall be opened at every place, whether within or without the State, where a regiment, battalion, battery, or company of Michigan soldiers may be found or stationed, and at such election all persons may vote who are thereto entitled by law and by the provisions of this act."

Now, will anyone pretend that that prescribes a place or places of election? What place or places? Would a law which provided that any elector of Michigan should vote at any place, within or without the State, where he might happen to be on the day of the election, prescribe a place of voting? This is too clear, I submit with all deference, to admit of argument. If Congress or the legislature can prescribe places of election outside of the State, I insist that the places must be named in the act, and that it is no compliance with the Constitution to provide that a man, or company of men, may vote at any place where they may happen to be on the day of election, and that such a law does not prescribe a place of election at all.

Therefore the minority concluded that Mr. Baldwin had been duly elected and was entitled to the seat.

The question was debated at length and decided on February 13 and 14.[1] The motion to substitute the resolutions of the minority for that of the majority declaring Mr. Trowbridge entitled to the seat, was decided in the negative, yeas 30, nays 108. Then the majority resolution was agreed to without division.

857. The Indiana election case of Washburn v. Voorhees, in the Thirty-ninth Congress.

As to the authority of a mayor to administer oaths in taking testimony under the law of 1851.

A discrepancy between the votes cast and the returns and evidence of tampering with the ballot box justified rejection of the poll.

Returns being rejected, the vote may be proved aliunde.

On February 19, 1866,[2] the Committee of Elections reported in the case of Washburn *v.* Voorhees, of Indiana.

At the outset in this case a preliminary question was raised by the sitting Member, who alleged that contestant's testimony had not been taken before a person authorized to take the same. The report says:

It was taken before Albert Lange, mayor of the city of Terre Haute, in the county of Vigo, in said district, but was not taken in the city of Terre Haute, but in the towns of Sullivan, Sullivan County, Cloverdale, Putnam County, Carlisle, Sullivan County, and Lockport, Riley Township, Vigo County. The statute of the United States under which these proceedings are conducted contains (Stat. L., vol. 9, p. 568) the following provision:

"That when any such contestant or returned Member shall be desirous of obtaining testimony respecting such election, it shall be lawful for him to make application to any judge of any court of the United States, or to any chancellor, judge, or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officer shall reside, within the Congressional district in which such contested election was held, who shall thereupon issue his writ of subpoena. * * *"

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[1] Journal, pp. 268, 272; Globe, pp. 814, 839–845.

[2] First session Thirty-ninth Congress, House Report No. 18; 2 Bartlett, p. 54.

But the statutes of Indiana confer authority to administer oaths upon a mayor of a city only within the city of which he is mayor; and it is contended by the sitting Member that the oath administered by the magistrate in taking these depositions was administered by virtue of his office of mayor, and therefore when administered outside of the city of Terre Haute was administered without authority. But the committee were of opinion that the authority to take these depositions was derived, not from the statutes of Indiana, but from the statute of the United States already cited, the mayor of a city being one of the persons designated in that statute to take such depositions, and that he would have been authorized as such designated person to take these depositions had the statutes of Indiana conferred upon him no power to administer oaths. Indeed, the power to administer oaths within their respective cities was not conferred by the statutes of Indiana at all upon mayors till the year 1861. Yet during all the time since the passage of the United States act of 1851, before cited, the mayor of any city within the district has been a person designated to take depositions in a case of contested election. The committee, therefore, denied the motion to reject the testimony.

The minority in their views dissented briefly from this ruling. Later in the debate [1] Mr. S. S. Marshall, of Illinois, who presented the minority views, insisted that the law of 1851, by giving authority to a mayor in the "city in which said officer shall reside" to administer oaths, circumscribed the authority of the mayor of Terre Haute as effectually as did the statutes of Indiana.

As to the merits of the case, it appeared that in the eight counties of the district the official majority for Mr. Voorhees, the sitting Member, was 534.

The issue was joined on the polls of four precincts, in three counties, where contestant alleged that the ballots were tampered with after they were cast and before they were counted. The precincts were:

Hamilton: In this township the official return gave Mr. Voorhees, the sitting Member, 498 votes and Mr. Washburn 143. The contestant asked that the return be set aside as "so tainted with fraud that the truth can not be deduced therefrom," alleging that the ballot box had been tampered with so that the return did not state the true poll. Two kinds of evidence were offered in support:

First, to show how many voters actually cast their votes at this precinct for the contestant; and, secondly, evidence tending to show an actual tampering with the ballot box after the close of the polls and before the count was completed. The evidence satisfies the committee that 170 men at least voted for the contestant at this precinct. One hundred and sixty-four witnesses testified to their own votes for him, and as to the remaining 6 not present, the testimony of witnesses that they knew the vote of each to be also for the contestant left the committee entirely satisfied that this number at least had so voted. There was testimony tending to the same result as to several others, but not sufficiently positive to satisfy the committee. Here is thus shown a discrepancy between the official return for the contestant and the proof of the vote actually cast for him at this precinct alone of 27 votes. There was no attempt to show the discrepancy between the vote actually cast for the sitting Member and the vote returned for him, nor was any attempt on the part of the sitting Member made to explain this discrepancy in the vote for the contestant.

As to the tampering with the ballot box, the contestant showed that his friends had been denied representation on the board of election officers; that the board had adjourned for supper, leaving the partly counted ballots in the box, those counted being strung on a string and laid on top of the uncounted ballots; that the contents of the box, which was left without a custodian, was found disarranged when they returned, the counted ballots being beneath the others, and finally, that the election

[1] Globe, p. 992.

officers, in a published card, admitted that the box must have been opened and the ballots handled in their absence. The report says that these facts:

All compel to the conviction that "the truth can not be deduced from this return," and it is accordingly rejected.

But the rejection of a return does not necessarily leave the votes actually cast at a precinct uncounted. It only declares that the return having been shown to be false shall not be taken as true, and the parties are thrown back upon such other evidence as is in their power to show how many voted and for whom, so that the entire vote, if sufficient pains be taken and the means are at hand, may be shown, and not a single one be lost, notwithstanding the falsity of the return. (See Blair *v.* Barrett, Bartlett's Contested Election Cases, pp. 313, 321; Clark *v.* Hall, ibid., 215.) It was proved, as has already been stated, that 170 votes were cast at this precinct for Mr. Washburn. There was also the testimony of four persons that they voted for Mr. Voorhees.

In the course of the debate [1] this principle that a return having been set aside, it was allowable to show aliunde the real state of the vote was contested, and Mr. Henry L. Dawes, of Massachusetts, chairman of the Elections Committee, reenforced the position of the report by citing the case of Knox *v.* Blair in the House and the cases of Reed *v.* Kneass and Mann *v.* Cassidy in the courts.

The minority views assailed the conclusion as to Hamilton Township by assailing the testimony as to the number of votes received by contestant. Twenty men who swore they voted for contestant could not themselves write their own names. One man's vote was not sworn to himself, but by another person. The voting was by ballot, and ignorant men might be mistaken as to the vote they actually cast, and a person who testified as to another's vote was especially liable to be deceived.

858. The case of Washburn v. Voorhees, continued.

Discussion of the kind of evidence required to prove aliunde a vote at a precinct whereof the returns are rejected.

As to the competency of a voter as a witness to prove for whom he cast his ballot.

In a simple case of discrepancy between the vote returned and the vote proven by testimony of voters, the return was corrected, not rejected.

The election officers being shown to be unreliable so that the truth is not deducible from their returns, the returns are rejected.

Cloverdale: The proceedings were similar to those in the case of Hamilton. The votes were not counted until the day after election. The ballot box was kept on the night preceding the count in the house of a friend of the inspector. That house was visited during the night by a man named Scott, a friend of the sitting Member. The report says as to Scott's visit:

The owner of the house testified that he did not know at what time he came, what he came for, and what he did. And his purpose and business, as well as the success which attended it, only appear from the testimony of a witness who overheard him afterwards relate it. But this was hearsay evidence, which the committee rejected. The case against this ballot box therefore rests upon the great discrepancy between the return (58) and the number (91) proved to have voted for Mr. Washburn, the temptation in the close vote in the county, the opportunity for tampering with the ballot box during the night, and the suspicious visitation of Scott from the county seat during the night, together with such inferences as it is fair to draw from the fact that no witness is contradicted, no testimony is controverted, no suspicious

[1] Globe, pp. 969, 970.

circumstance explained, so easy of explanation by the calling of Scott or the inspector, if the truth permitted it. But as the result to which the committee arrived upon the whole case, as hereafter stated, would not in any aspect be changed, whether this return be rejected or corrected, they did not determine to reject it entirely, however much confidence in it must be shaken in every fair mind by the evidence here adduced. They, instead, gave the contestant the benefit of the discrepancy proved—viz, 33 votes.

The minority attack the testimony as to this township, showing that 10 persons who swore to their votes for contestant could not write their own names, and that the votes of 12 others were testified to by other persons, the voters themselves not being produced and sworn. The minority condemn this secondary evidence as weak and unsatisfactory.

Jefferson: The report says:

The official return from this township was for Mr. Voorhees, 236 votes; for Mr. Washburn, 24 votes. The evidence relied on to show fraud in this return consists wholly in a discrepancy proved between the vote actually cast and that returned for the contestant. It is shown in this record, by the testimony of the voters themselves and those who knew how others absent voted, that 36 instead of 24, the returned number, voted for Mr. Washburn. There was no other testimony to show fraud in this ballot box as the testimony was left by the parties. The committee had the evidence furnished them of correcting all the errors shown, however that might have arisen. They therefore did not reject but corrected this return, giving to the contestant the benefit of the 12 votes here proved and not counted.

The minority make the same criticism of the testimony as in the two preceding cases.

Riley: In this township the testimony showed 108 persons who voted for contestant, while the official return gave him only 88. In addition it was shown that on the day of the voting, during the noon adjournment, the ballot box was taken to the inspector's home and placed in a room adjoining the dining room. The inspector went into this room alone after dinner, remaining there about fifteen minutes. The next morning the servant found "a quantity of republican votes" under the carpet. When the votes in the ballot box were counted a discrepancy between the total and the tally paper was rectified by counting loose votes off the table, to the number of four or five. The sitting Member neither explained nor counteracted the above testimony. Therefore the committee were "compelled to the conclusion that this box also had been opened and votes, no one could tell how many, abstracted therefrom, and that other votes never in the box had been counted, no one could tell for whom, and consequently there existed fraud in this return to such a degree that the truth could not be deduced therefrom. They therefore rejected it. One hundred and eight persons, as before stated, were proved to have voted at this precinct for the contestant, and were counted for him by the committee."

The minority attack the evidence in this case, as in the other precincts.

The majority report, made by the chairman of the committee, Mr. Henry L. Dawes, of Massachusetts, gives this argument as to the principle of law which should govern the disposition of the case:

There was little dispute before the committee as to the law which should govern this case. It is laid down as a general principle by Cushing, in his treatise on "The law and Practice of Legislative Assemblies," page 72, that "if returning officers act in so illegal or arbitrary manner as to injure the freedom of election, the whole proceedings will be void." In a late case in the courts of law—that of Mann *v.* Cassidy, for the office of district attorney in the city of Philadelphia—the court, in giving its opinion, says: "As the case now stands before us, we should be derelict in our duty did we not unhesitatingly express our conviction that the officers in the election divisions to which we have referred, in the receipt

and recording of votes, are so utterly and entirely unreliable that the truth can not be deduced from any records or returns made by them in relation thereto." * * * "The entire proceedings were so tarnished by the fraudulent conduct of the officers charged with the performance of the most solemn and responsible duties that it would have been not only abundantly justified, but it would have been our plain duty to throw out the returns of every division to which we have referred."

The same doctrine has been repeatedly laid down by Committees on Elections in the House of Representatives. (See Blair *v.* Barrett, Bartlett Contested Elections, p. 308; Knox *v.* Blair, ibid, p. 520, and cases there cited. See also Kneass's case, Parsons's Select Cases, p. 553, and Howard *v.* Cooper, Bartlett, p. 275.) Indeed, the rule laid down in the latter case at page 526 was accepted by both parties as the law which should govern this case, and they took issue upon the facts. The rule is in these words:

"When the result in any precinct has been shown to be 'so tainted with fraud that the truth can not be deducible therefrom,' then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown."

Indeed, the proposition is too plain to admit of dispute. To hold as true that which is so false and fraudulent that the truth can not be deduced therefrom is to hold to an absurdity. The rule here laid down is none other than the postulate that that which is false can not be true. In adopting this rule the committee do not lose sight, however, of the danger which may attend its application. Wholesome and salutary, not less than necessary, in its proper use, it is extremely liable to abuse. Heated partisanship and blind prejudice, as well as indifferent investigation, may under its cover work great injustice. It is not to be adopted if it can be avoided. No investigation should be spared that would reach the truth without a resort to it. But it is not to be forgotten or omitted if the case calls for its application. If the fraud be clearly shown to exist to such an extent as to satisfy the mind that the return does not show the truth, and no evidence is furnished by either party to a contest, and no investigation of the committee enable them to deduce the truth therefrom, then no alternative is left but to reject such a return. To use it under such a state of facts is to use as true what is shown to be false.

The report also comments on the loose provisions of the Indiana law, which permitted the ballot box to be taken about without careful custody before the count.

The minority generally criticised the evidence of the contestant as unreliable or "hearsay," and urged that fraud should be actually proved, and not be presumed from mere suspicious circumstances.

The majority of the committee, in conclusion, found a majority of at least 52 for the contestant on the least favorable construction of law.

The report was debated in the House on February 21 and 23,[1] when the House, by a vote of yeas 30, nays 96, disagreed to an amendment declaring Mr. Voorhees, the sitting Member, elected and entitled to his seat. The resolution of the majority declaring him not elected and not entitled to the seat was then agreed to without division.

The resolution declaring Mr. Washburn entitled to the seat was agreed to—yeas 87, nays 36.

859. The New York election case of Dodge v. Brooks in the Thirty-ninth Congress.

The Elections Committee may consider a case, although the pleadings do not all meet the requirements of the law as to specifications.

The allegation that "sundry" disqualified persons in the district voted for contestee was permitted in a notice of contest, although criticised.

Omission to specify definitely in the notice of contest a district alleged to be illegally constituted was not held fatal.

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[1] Journal, pp. 318, 322; Globe, pp. 967, 991–1005.

On March 26, 1866,[1] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, reported in the case of Dodge *v.* Brooks, from New York.

At the outset the report raises a question of pleading—

The allegations of contest are long, and some of them very vague and uncertain, conforming in no sense to the provisions of the statute requiring a contestant to "specify particularly the grounds upon which he relies in the contest." The answer of the sitting Member, pages 1 to 5, is quite as vague and uncertain.

The committee, however, find four precincts as to which they conclude—

In the opinion of the committee, there is contained in the several allegations of the contestant respecting these four precincts a distinct allegation of fraud in the election and error in the return sufficiently specific to require an answer from the sitting Member and to form the basis of a fair trial of the facts involved in the issues thus made up.

[The allegations for these four precincts are given below in connection with the examination of the precincts.]

The minority criticised in their views the specifications as to one of the four precincts—the seventh of the Twenty-first Ward—saying:

The allegation here is—

"That sundry persons voted for Mr. Brooks who were not legal voters or residents in the district, viz, one hundred and upward."

The act of Congress (first section, statute of 1851) regulating notice as to the contest of election, reads, in conclusion, thus:

"And in such notice shall specify particularly the grounds upon which he, the contestant, relies in the contest."

The sitting Member at the start protested against the illegality of such a notice and argued throughout that its generality was not only in violation of the statute, but of such a nature that it could not be traversed, save by a denial as "sundry" broad as the sundries alleged; thus substituting in lieu of a plea "a stump speech on both sides." The object of the act of Congress forbidding such sundry generalities, and prescribing therefor a particularity, was to prevent a surprise upon the sitting Member (Leib's case, C. T. E., p. 165) and not to give uneasiness to a sitting Member upon slight grounds (Varnum's case, C. T. E., p. 272). Courts acting upon contested elections require the parties complaining to specify, because otherwise they would be converted into a mere election board (Littell *v.* Robbins, C. T. E., Bartlett, 138). It is obvious that in a contested case like this, where the contestant is a man of immense wealth, who it is proven has lavished large sums illegally upon the election, a sitting Member, unless equally wealthy, has no chance of meeting him in a contest, if, after the election, the election can be gone over again under some of the forms and protection of the State law, under the pretense of such a "sundry" notice as to sundry persons, "one hundred and upward." The Committee of Elections, and through their chairman, Mr. Dawes (Kline *v.* Verre, Bartlett, p. 383), is emphatically committed not only against these generalities, but against this particular word "sundries" in the notice.

As to the fifteenth district of the Eighteenth Ward the minority say:

The twelfth allegation of the contestant is—

"That the fifteenth district was not legally created and established (with a general averment of frauds)."

But not specifying the fifteenth district of the Eighteenth Ward, and thus leaving the sitting Member to guess that was the district meant. In all the other allegations of the contestant the ward where the district is contested is specified. Objection was taken to this at the start (B., 3) and persisted in throughout, and the sitting Member did not know what district was meant till contestant, a very few days before the closing of the testimony, disclosed what he meant.

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[1] First session Thirty-ninth Congress, House Report No. 41; 2 Bartlett, p. 78; Rowell's Digest, p. 203.

860. The case of Dodge v. Brooks, continued.

Testimony taken without the notice required by the law of 1851 was excluded.

Hearsay testimony is not admitted in the determination of an election case.

Where an election return is so tainted with fraud that the truth can not be deduced therefrom, the same must be set aside.

As to the merits of the case, it appeared that the official return gave the sitting Member 8,583 votes, the contestant 8,435, and a third candidate, Thomas J. Barr, 4,544 votes. Thus Mr. Brooks was on the face of the returns elected by a plurality of 148 votes.

As this election turned very largely on the question as to how far violations of a registry law should be allowed to have weight in nullifying an election, the committee explain at length the registry law of New York:

The law of New York under which this election was held required a previous register of all the votes in each precinct, and, with one exception, based on particular and specific proof, no one could lawfully vote whose name was not found when he came to the polls upon the register, together with his street and number, if he had any. To effect this register the statute required the appointment annually, in each election district, by the board of supervisors, of "three inspectors, to be known as the board of registry for the election districts in which they are appointed; such inspectors to hold their offices for one year, and to be residents and voters in the district in which they are so appointed." These inspectors are required to meet annually, "at the place designated for holding the poll of said election," on Tuesday, three weeks preceding the general election, and organize themselves as a board for the purpose of registering the names of the legal voters of such district; choose one of their number as chairman; swear each other into office; appoint a clerk, if necessary, who shall take the oath required by law of clerks of the polls or of elections; and shall have power to continue in session, for the purposes of this meeting, viz, the making of said list, for two days if at the annual election next prior to said meeting the number of voters in the district of which they are inspectors exceed four hundred. This board is at this meeting to make a list of all persons qualified and entitled to vote at the ensuing election in the election district of which they are inspectors, which, when completed, shall constitute and be known as the registry of electors in said district. The list is to contain the names, alphabetically arranged in one column; "the residence by number of the dwelling, if there be any number; and the name of the street or other location of the dwelling place of each person." It is made out, in the first place, by putting upon it the names of all persons residing in their election districts whose names appear on the poll list kept in said district at the last preceding general election, taken from the copy of that list required by law to be deposited after such election with the county clerk. In case of the formation of a new election district since the last election, the list is to be made up by taking from the said poll list of the old district of which the new one formed a part the names of those on the same entitled to vote in the new district. The list is to be completed, as far as practicable, on the day of meeting; four copies are to be made and certified to be, as far as known to them, a true list of the voters in said district. Within two days the original from which the four copies are taken, together with the old list taken from the county clerk's office, shall be placed by said inspectors in said office. One of the certified copies shall be, immediately after its completion, posted in some conspicuous place in the room in which said meeting shall be held; that is, in the room designated for holding the election, accessible to any elector who may desire to examine or copy the same. The other three copies are to be kept for future use by the three inspectors. This closes the first duty of the board of registers. A further duty is also required of them by law, and that is to meet again on the Tuesday week preceding the day of general election in their respective election districts, "at the place designated for holding the polls of election, for the purpose of revising, correcting, and completing said list," at 8 o'clock in the morning, and remain in session till 9 o'clock in the evening of

that day and the day following, in open session, where every legal voter in said district shall be entitled to be heard by said inspectors in relation to corrections or additions to said register. One of said copies is to be used by the registers in making the corrections and additions.

The law further provides for copies of the registry list for use at the polls, and then contains a provision explained as follows in the report:

No person can vote at the election if his name is not upon the register thus prepared, unless he shall furnish to the board of inspectors his affidavit giving his reasons for not appearing on the day for correcting the alphabetical list, and also proves by the oath of a householder of the district that he knows such person to be an inhabitant of the district, giving his residence within the district. Any person whose name is on the register may be challenged, and an examination into his qualifications shall then and there be had, such examination being conducted in a manner prescribed by law, which need not here be set out.

This provision was considered as having an essential bearing on the case and in the House during the debate [1] the position was taken that the result of the election might not be set aside because of the informality in the preliminary registration, which, by its own terms, was not conclusive on the rights of the voter. It was admitted on behalf of the committee that a fraudulent registry was not conclusive of itself, but was one of the steps in the proof that the poll was fatally defective.

Passing to the attacked precincts:

Fifteenth district of the Eighteenth Ward: The direct allegations of the contestant touching this district are as follows:

That the fifteenth district was not legally created and established; that it was not known to bona fide residents of the district; that the inspectors of election themselves ascertained the same only by persistent inquiry on the morning of election day; that the register was fraudulently and irregularly filled with the names of your partisans, most of whom do not reside in the district; that the majority of the names therein were copied from lists handed in by a barkeeper on the premises, an ardent Democrat; that the clerk who acted for the board of registry was neither sworn nor appointed; that the district, only a portion of the original twelfth district from which it was separated, gave more votes than the whole of the twelfth district at the election last year; that the population of the district had not during the twelve-month increased materially; that of these votes then cast for you one-third and upward were given by parties not qualified to vote.

And the general allegation is in these words:

That other irregularities, defects, and illegalities were permitted or occurred in conducting said election, whereby my rights as a candidate were prejudiced.

The majority of the committee were satisfied from the testimony that the allegations were sustained, although they found it necessary to exclude the testimony of contestant's principal witness, named Dean, because the sitting Member objected that the ten days' notice required by law for the taking of this deposition had not been given.

It appeared that the witness's name was omitted from the notice by a clerical error; but the committee declined to admit the testimony.

The contestant then sought to prove the same thing by another witness who had obtained his knowledge of the fact from Dean himself. This was objected to by the sitting Member as hearsay testimony, and the objection was sustained by the committee.

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[1] Record, pp. 1748, 1791, 1814.

The committee reached this conclusion:

The committee are of the opinion that there was no registry at this district; that neither of the persons appointed as registers was competent to hold the office; that the man acting as clerk acted without authority; that the mode of making up the registry itself was a fraud upon the registry law, and in no manner a compliance with its provisions; that the use of such registry at the polls as a guide to the inspectors of election contributed directly to the polling of fraudulent votes, and that the large and unaccounted for increase of votes at this poll is directly attributed to these departures from and violations of plain provisions of law, and that to accept the result of such poll so taken and so counted as the true account of legal votes only, is to sanction most inexcusable violations of important provisions of law, essential to the purity of the ballot box. The committee are therefore of the opinion that this return falls within the principle found in cases heretofore adjudicated and which was laid down in the case of Washburn *v.* Voorhees, lately sanctioned by this House, namely: "Where an election return is so tainted with fraud that the truth can not be deduced therefrom, the same must be set aside."

The committee are, however, of the opinion that it was competent for either contestant or sitting Member to prove the casting of legal votes at this poll, even without a register; but, in such cases, the voter must make special proof of his qualification to vote in a manner particularly pointed out in the statute; and that it would have been the duty of the committee to have counted all votes so proven, but that no presumption of the legality of any vote would arise from any of the proceedings or returns founded upon so illegal and fraudulent transactions as have been here shown to exist. No proof of any such votes was offered by either contestant or sitting Member; nor was it claimed by either that this provision of law was complied with; but, on the other hand, it was totally disregarded. The statute of New York is express, that no vote shall be received except after a compliance with these provisions. For the committee to count votes thus cast would be for them to set up a poll in defiance of the statute provisions of the State, as well as in disregard of well-established precedents in this House. On the other hand, in conformity with those statutes and precedents, they have set aside this return altogether as fraudulent and false, as well as in conflict with express provisions of law.

The minority in their views contend that the committee erred in throwing out the whole precinct when only a portion of it was impeached by contestant's testimony; that the registration officers were officers de facto; that a majority of the registrars and inspectors of election belonged to the party of the contestant; and that there had been bribery in behalf of the contestant.

As the throwing out of this precinct was of itself sufficient to change the official result and give a plurality to contestant, the principles and facts in this connection were examined at length in the debate. Whether the action of the registry officials was in law part of the election, whether votes legally cast should be thrown out in the rejection of the whole poll, were questions considered at length, and were made the subject of a vote in the final decision.

Seventh district of the Twenty-first Ward: In this ward the registry seemed to the committee to be proven to be fraudulent, and the vote itself showed a suspicious increase over the vote of former years, although the places of residence had rather diminished than increased. The registry list was shown to contain large numbers of fraudulent names, on which persons not residents of the precinct were allowed to vote. The principal witness for the contestant was one of those who committed the fraud, and as particeps criminis was admitted by the committee to be a poor witness; but his testimony was corroborated by others to the satisfaction of the majority, who concluded as to the precinct:

It will be observed that the whole poll for Member of Congress in this district was only 389, and of this number the committee are of opinion that 116, at least, are fraudulent. There are no means of determining for whom these fraudulent votes were cast, beyond the 30 which is the number one of the

witnesses testified that he was certain he succeeded himself in getting to vote for the sitting Member, and beyond the further fact that one at least of the parties most actively engaged in the affair, at whose shop the election was held, and who had the greatest facility for carrying it out, testified that he was laboring in the interest of the sitting Member; still, 86 of these fraudulent voters can not by any safe evidence be charged to the count for either of the three candidates. They are, however, in the count, as well as 30 traced to the sitting Member, and must have been counted for one of the three. What is the duty of the committee and the House with such a return? It must stand as it is, or be set aside altogether, for the means are not at hand by which the return can be purged of the fraud. Thirty might be taken from the account for the sitting Member, but 86 as fraudulent would still be left, and the return thus corrected would contain in it one vote in every four a fraudulent one.

The committee see no alternative but to accept the return and thus sanction the fraud, or set it aside altogether. They can not doubt that the latter course comes within the precedents of former Congresses and of this committee and of the present House, and they therefore reject the return altogether.

The minority attack the testimony offered by the contestant as unreliable; and that he had failed to call the registrars, a majority of whom belonged to the contestant's party.

In the debate, Mr. Dawes discussed[1] the disposition of a poll where one in four votes was shown to be fraudulent, but where it was impossible to show for whom the fraudulent votes were cast. The committee were not strenuous for casting out the whole poll, since it did not change the result.

861. The case of Dodge v. Brooks, continued.

While conduct of election officers may justify their punishment for misdemeanor, it may not justify rejection of the returns made by them.

Testimony as to statement of a voter a considerable time after the act of voting was not admitted to prove how he voted.

An invalid registry, election officers improperly appointed, large and unexplained increase of the returned vote, and inexcusable violations of law justified rejection of the return.

Thirteenth district of the Eighteenth Ward: In respect to this district the contestant alleged:

That in the thirteenth district of the Eighteenth Ward the voting was of such a grossly fraudulent character as to involve all concerned in it, either in participation or passive permission, and to render it impossible to sift and purge the poll; that one of the inspectors, already a partisan of yours, was bribed to break every law intended to preserve the purity of the ballot box to accomplish your election; that this said inspector exchanged places with another partisan of yours who, unsworn, acted as inspector; that another partisan of yours, unsworn and unappointed, acted as poll clerk; that one of the inspectors snatched Republican ballots from the hands of his associates and changed them to Democratic amid the applause of disorderly sympathizers in the polling room; that he refused to receive divers votes intended for me, and all soldier votes, menacing with oaths and imprecations those who offered them, so that his threats and those of his sympathizers prevented, after a certain hour of the day, any citizens from offering soldiers' votes; that during the day persistent attempts were made to bribe to infidelity to his trust one of the Republican inspectors; that the same inspector was, on the evening at the close of the election day, for his fidelity, assaulted, struck down, and grievously injured; that in canvassing the votes the greatest frauds were perpetrated, partisans of yours unsworn acted as canvassers, double votes were counted as two each for you, incorrect ballots were counted as correct, and when neither poll list, tally, nor ballots agreed, two or more of your partisans rushed within the inclosure, and with the pen and pencil labored successfully to conceal and correct the same after the Republican canvassers had, under their threats, withdrawn; then in this same district sundry persons were permitted to vote once for you, and others were permitted to vote twice, who were not qualified voters, to wit, 200 and upward.

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[1] Globe, p. 1751.

The committee, after examining the testimony, concluded that it did not show, beyond a reasonable doubt, that any actual fraud was committed, and that the conduct of the election officers, while it might justify their punishment for misdemeanor, did not justify the rejection of the poll.

Third district of the Twenty-first Ward: The contestant alleged:

> That in the third district of the Twenty-first Ward 188 votes were cast for me, 137 for you, and 206 for Thomas J. Barr; but that, through the fraud or negligence of the canvassers, the votes correctly counted were incorrectly credited and entered upon one of the returns; that the other correct return was lost from the office of the county clerk; that under threats and intimidations on the part of your agents, and a writ of mandamus issued on motion of your attorney, after the board of county canvassers had been already a week in session, the board of canvassers for the district was forced to sign, and file a return with the county clerk, the duplicate copy of that in the hands of the supervisors of the county.

The committee were of opinion that this allegation permitted only of proof that there was error in the returns. Suspicious circumstances attended the making of the returns, and the contestant attempted to show the fraud by proving individual votes. The report says:

> From a careful examination of the testimony offered, to prove for whom voters cast their votes, it appears that several of the 159 claimed by the contestant to be proved to have cast their votes for him, 13 at least are so proved only by proving the statements of the voter made to third persons, not at the time he cast his vote, but about the time the deposition was taken, which was four months after the election. The committee are of opinion that no precedent can be found for receiving such testimony, and they decline to recommend one. This reduces the discrepancy between the return and the number proved to 9 votes, admitting that there can be no doubt as to the proof in relation to the vote of each one of the remaining 146.

Therefore the committee, considering the liability to mistakes after so long a time, did not feel justified in disturbing the returns by adding the nine votes.

The majority of the committee therefore found that the contestant had been elected, and was entitled to the seat.

The report was debated at length from the 3d to the 6th of April,[1] and on the latter day the question was taken first on an amendment proposed by Mr. James A. Garfield, of Ohio, but later modified and presented by Mr. S. S. Marshall, of Illinois:

> That the invalidity of the register of the Fifteenth election district of the Eighteenth Ward of the city of New York would not of itself justify the rejection of the official returns of the canvassers of that district.
>
> *Resolved,* That this case be recommitted to the Committee on Elections to report upon supplementary proof, to be made as provided in the next resolution.
>
> *Resolved,* That either party be authorized to take supplementary testimony respecting the election in the fifteenth district of the Eighteenth Ward only, before the 10th day of May next, complying with the statutory regulations applicable to the case: *Provided,* That five days' notice of any proposed examination of witnesses shall be sufficient.

The House disagreed to this amendment, yeas 53, nays 80.

The House then, by a vote of yeas 54, nays 78, disagreed to an amendment declaring William E. Dodge, the contestant, not entitled to a seat.

Then, by a vote of yeas 85, nays 45, the resolution of the majority declaring contestee not entitled to the seat was agreed to; and, finally, by a vote of yeas 72, nays 53, the contestant was declared elected.[2]

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[1] Journal, pp. 493, 498, 506, 513; Globe, pp. 1746, 1768, 1791, 1812–1820.

[2] Journal, pp. 513–516.

862. The Ohio election case of Follett v. Delano in the Thirty-Ninth Congress.

It was held in 1866 that proof of notice of service of contest might not be by affidavit of the o1ficer serving the notice.

It was held in 1866 that under the law of 1851 notice of contest must be served upon the returned Member personally.

Decision as to what is a determination of result within the meaning of the law providing for serving notice of contest.

On May 14, 1866,[1] the Committee on Elections reported in the case of Follett *v.* Delano, from Ohio. The sitting Member was returned by a majority of 239. Several questions were involved in the inquiry of the committee:

1. As to what is legal evidence that a notice of contest has been served.

The sitting Member having contended that no notice of contest had been served on him, the contestant presented affidavits of James T. Irvine, a notary public, who deposed that he served notice on sitting Member by leaving it at his residence, and later personally saw him and requested him to accept service as of the date of service at the residence. The sitting Member contended that the affidavits, not being depositions taken on notice to the opposite party, were not legal evidence. The committee concluded as follows in relation to this aspect of the case:

> The question raised by the first objection made by the sitting Member is, can service of notice be proved by affidavit, or must the testimony of a witness to the fact of service be obtained, like all other testimony, from witnesses, by deposition taken on notice to the opposite party, in conformity with the statute? The statute does not provide in what manner the fact of service shall be proved, but makes the general provision already cited for taking testimony. It may be noticed that this statute provision does not require the testimony of witnesses to be taken in the manner prescribed—only "it shall be lawful", to take it in the way therein specified. Therefore, in the absence of any statute requirement as to the mode of proof of notice of contest, is the affidavit of a third person sufficient? This is the first case since the enactment of the law of 1851 where the question has been raised, so far as the committee knows, or where it could, in practice, have been well raised; for though affidavits have been resorted to in almost every case as proof of the service of notice of contest, yet in every instance till the present case there has been an answer from the sitting Member admitting the service of notice or waiving proof of it. The sitting Member made no answer in this case, and neither admitted nor denied, but left the contestant to prove that he had served the notice at all, and within the time prescribed by law.
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> The committee are of opinion that such proof, to be admissible, must be authorized by statute or some rule established by the tribunal before which the testimony is to be used, and that in the absence of these an affidavit could not be admitted according to the principles which govern in the course of all judicial proceedings. To admit an affidavit of a third person, unknown in character to the sitting Member, taken without his knowledge, at a time and place and under circumstances wholly kept from him, is to open a door through which great fraud might be practiced if occasion required. It is a fact, too, as easy of proof in the manner pointed out in the statute for taking testimony as any other fact in the case, and it is deemed by the committee the safer way to require its proof in that mode, if the answer of the sitting Member does not sufficiently admit the fact or waive the proof of it. This answer, if made, must by law be in possession of the contestant before he can proceed to the taking of testimony under the statute, and therefore he will always have the means of determining the necessity of proof.
>
> The committee did not, however, close their hearing of the case with their conclusion upon this point, for the reason that they could not know that the House would agree with this conclusion, and in that event it would become ultimately necessary for them to pass upon the merits of the case. The committee were also desirous of reaching the merits of the case, if possible, and therefore, reserving their decision upon all preliminary points, they heard the parties upon the entire proof submitted.

[1] First session Thirty-ninth Congress, House Report No. 59; 2 Bartlett, p. 113.

2. As to whether or not the notice must be served on the contestee personally. The report finds:

The second point raised by the sitting Member was, that "if the recitals of the affidavits of notice be taken as proved, still the contestant had failed to 'give' him the notice required by the statute." The sitting Member claimed that the statute required personal notice. By the first affidavit of Mr. Irvine it appears that notice was served upon the sitting Member "by leaving it at his residence in Mount Vernon, Knox County, Ohio, on the 29th of December, A.D. 1864." The statute provision is, that "the contestant shall give notice in writing to the Member whose seat he designs to contest." Is leaving a copy at the residence "giving" the sitting Member such notice as the statute requires? Serving of notice by leaving a copy at the residence is not unusual in judicial proceedings, but it is believed by the committee that such service is never legal unless authorized by statute, and can never be substituted for actual notice unless thus sanctioned. In the law of 1851 there is an express provision for leaving a notice of taking depositions at "the usual place of abode" of the opposite party, but none for such service of notice of contest. A reference to the debate in the House at the passage of this act will show that this omission was designed in order to secure actual notice.

3. As to the time prescribed by the law of 1851 for the service of notice: The committee found that the law of Ohio provided that the result of the election should be determined "within ten days after the first day of December," but the certificate might be given to the successful candidate at any time thereafter. The law of the United States, statute of 1851, required the notice of contest to be served "within thirty days of the time when the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same." As the law of Ohio provided for no proclamation of the determination of the result, and as the statutes provided no way for ascertaining on what day within the specified limit the determination had been made, the committee were of the opinion that the contestant had thirty days from, the last of the "ten days after the first day of December." Therefore the 5th day of January, the date when an effort was made to have Mr. Delano accept service as of previous date, was held to be within the limit.

863. The case of Follett v. Delano, continued.

Failure of returned Member to answer notice of contest may not be taken as a confession of the truth of the allegations.

The electors are interested parties to a contest and may not be precluded by any laches of contestant or returned Member.

It being possible to ascertain the result with certainty from tally lists returned with the ballots, these returns are sufficient, although not strictly in accordance with law.

4. As to whether or not the contestee, by failing to answer the notice, may be considered to confess the truth of the allegations: The law of 1851 requires the sitting Member, "within thirty days after the service, to answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election." The contestant claimed that the sitting Member, by failing to answer, must be taken to have confessed the truth of the allegations in the notice. The committee say that this might be so were the contestant and sitting Member the only interested parties, and continue:

The electors of the district, each and every one of them, have a vital interest in that question, and no one of them can be precluded, by any laches not his own, from insisting that the choice of the

majority shall be regarded. No confession of the sitting Member, however it might bind him personally, can place the contestant in the seat, unless he is the choice of the majority, nor deprive that majority of its rightful representation. The sitting Member may well be deprived, by his neglect to answer, of reliance upon "any other grounds upon which he rests the validity of his election," for he has never given notice of any such grounds; but the committee are of opinion that the House should require proof that the sitting Member has not, and that the contestant has, a majority of the legal votes before unseating the one and admitting the other, however the sitting Member may have seen fit to conduct his own case in a contest.

5. The question on the merits of the contest: The contestant claimed that enough votes should be deducted to leave a majority of 84 for himself. These deductions were claimed because the canvassers had counted "soldiers' votes" from returns so defective in form and substance as to make them wholly illegal and void, viz, that certain poll books were not certified to by officers of the election, as required by the Ohio law; that there was on certain poll books no certificate of the oath as required by law; that in another case the poll book did not show when, where, or by whom the election was held, the heading being left blank.

After quoting the law of Ohio in relation to soldiers' votes, the report refers to the papers required by law to accompany the poll books, and says:

A reference to the statute cited will show what these papers are which come up with the poll book, and what use they serve. From this reference it appears that there are to be kept two poll books, two sets of tally sheets, the form of which is given in the law, and the ballots themselves counted and strung on a string. The tally sheet gives the time and place of holding the election, the persons by whom it was conducted, the number of votes cast, and for whom; and the ballots show with equal certainty for whom and how many votes were cast. The poll book should show when and by whom the election was held, and the names and number of the voters. The law requires one set of tally sheets to be sent to each county having officers voted for; the other full set of the tally sheets and one set of poll books are to be sent to the State auditor; the other poll books and the ballots are to be sent to the secretary of state. Upon the day specified in the law the board of canvassers are required, in the manner therein specified, to take and canvass these returns and "declare and certify the number of votes shown by the tally sheets to have been cast for each candidate therein named, respectively." From these provisions it appears that the result is to be declared from the tally sheets alone—not from the poll books at all.

If, therefore, the "tally sheets" are complete, the means of ascertaining accurately the result are at hand. Indeed, the result could not be determined at all from the poll books, for they do not disclose for whom a vote was cast. The tally sheet is the only paper which shows that result. By counting the ballots anew that result may be verified; but the poll book would render no such aid. That contains only the number and names of the voters in the aggregate. Now, the law requiring the canvassers to declare and certify the number of votes shown by the tally sheets, and there being no proof or allegation that the tally sheets were not correct in form and substance, the return made from the tally sheets which shows a majority for the sitting Member, must prevail. It is competent to overthrow that return by proof, but not without it. Prima facie in the first instance, it remains sufficient until evidence in conflict with it shall be introduced satisfying the committee and the House that it is not true. Nothing has been introduced at all conflicting with the result declared from these tally sheets. Defective poll books do not conflict with the tally sheet. They may fail from this defect to corroborate, but do not, therefore, tell a different story. But the law does not require that the tally sheets shall be corroborated. They stand alone, unless overthrown by positive, not negative, evidence. This view of the law is entirely sustained in a recent case before the supreme court of Ohio, so nearly like this in the particulars here referred to as to be hardly distinguishable from it. It is the case of Howard *v.* Shields, decided at the December term of that court, A.D. 1865, and not yet published.

The committee say further that there was no allegation or complaint that the tally sheets were not perfect, and therefore the majority for the sitting Member could not be set aside.

On May 18,[1] the resolution reported from the committee declaring. Mr. Delano, the sitting Member, entitled to his seat, was agreed to without debate or division.

864. The Ohio election case of Delano v. Morgan in the Fortieth Congress.

Sitting Member consenting to contestant's application for further time to take testimony, the House agreed thereto.

Sitting Member waived objection as to the specifications of the notice by not making it when the testimony was taken.

The specifications of the notice of contest should be sufficient merely to put the opposite party on his guard.

On March 8, 1867,[2] Mr. Henry L. Dawes, of Massachusetts, from the Committee on Elections, presented a report on the petition of contestant in the case of Delano *v.* Morgan, of Ohio. Mr. Delano asked for an extension of the time for taking testimony because sitting Member's notices of contest "consume all the time allowed by law for taking testimony," and "for that the official duties of your memorialist as a Member of the Thirty-ninth Congress have prevented him from taking testimony in his case to the present time." The report of the committee says that for these reasons and for "the further reason that sitting Member consents thereto," the petition should be granted. The House thereupon adopted a resolution that the time be "hereby extended to each party for the period of seventy-five days from and after the passage of this resolution, said testimony to be taken in all other respects in conformity with existing law."

On May 25, 1868,[3] Mr. Glenni W. Scofield, of Pennsylvania, submitted the report of the majority [4] of the committee as to the final right to the seat, with resolutions providing for seating the contestant.

A preliminary question arises in this case as to the sufficiency of the notice of contest. The minority sustain the objection of sitting Member to two specifications, as follows:

2. Six hundred and twenty-five persons not legally entitled to vote were improperly and illegally allowed to vote at said election, and did cast their votes.

18. Illegal votes were cast for you at said election as follows: In Clinton Township, Knox County, 25 votes. [Here follows an enumeration of other townships in a similar way.]

The minority discuss these specifications as follows:

The sufficiency of those specifications was submitted for determination to the committee by the sitting Member, both in his printed brief and his oral argument before the committee. It is therefore the obvious duty of the committee to consider and decide that question. It is exceedingly material to the proper and just determination of the whole case and to the legal and substantial rights of the parties. We inquire, then, do the second and eighteenth specifications comply in terms or spirit with the express requirement of the law? Do they "specify particularly the grounds upon which he relies in the contest?"

Substantially the allegation in each specification is that illegal votes were cast for the sitting Member. It can not be said without doing most manifest violence to the intention of the law that such general and vague allegations can put the sitting Member in possession of the grounds of contest. They

[1] Journal, p. 718; Globe, p. 2678.

[2] First session Fortieth Congress, House Report No. 1; Journal, p. 23; Record, p. 33.

[3] Second session Fortieth Congress, House Report No. 42; 2 Bartlett, p. 174; Rowell's Digest, p. 213.

[4] Minority views were submitted by Mr. Michael C. Kerr, of Indiana.

do not aver in what the illegality of the votes consists. They do not state facts from which the illegality results as a conclusion of law. They only state the conclusion of law itself and entirely omit the recital of the reasons or facts that are indispensable to sustain the conclusion. This is a violation of most obvious principles of correct pleading and ought not to be approved. There is nothing in the nature or circumstances of this case to prevent or even render inconvenient a fair and full compliance with this law in the statement by the contestant of his grounds of contest. The object of all pleading, whether in ordinary actions at law or in contested elections or in any cases required to be subjected to judicial or even quasi judicial determination, is to limit, to restrict, to narrow, as much as practicable, the range and scope of the investigation, to exclude unnecessary latitude of inquiry, to disclose at the outset the difficulties to be overcome by testimony, or the specific conclusions intended to be established by proof, to the end that such litigation may be simplified and cheapened, not made interminable and unnecessarily expensive, and especially that no advantage shall be taken or injustice done, against which it is impossible to guard by reason of the uncertainty and vagueness in the statements of the grounds of controversy. The importance of these principles has been well illustrated in this case. The contestant wholly fails to specify the grounds of contest in his notice and then proceeds in his own order to make his proofs; but in reference to a large number of voters (alleged to have been deserters) takes his testimony at so late a day in the time allowed as to absolutely preclude the taking of counter testimony by the sitting Member. It was the intention of the law of Congress to prevent such results by requiring reasonable definiteness and certainty in the statement of the grounds of contest.

These principles have been repeatedly declared and sustained both in the English Parliament and in Congress.

The minority then cite the cases of Michael Leib, Easton *v.* Scott, Wright *v.* Fuller, White *v.* Harris, and Kline *v.* Verree, and conclude:

This reasoning seems to us conclusive and unanswerable. We conclude, therefore, that the specifications referred to are too vague and uncertain to satisfy the imperative requirements of the law, and that they did by reason thereof work undue prejudice to the sitting Member in his defense, and that the testimony taken under them ought not to be considered by the committee or House.

The majority of the committee do not discuss this in their report; but during the debate[1] the argument of the minority was answered at length, it being contended (1) that sitting Member had waived the objection by not making it when the testimony was taken, this rule being laid down in the case of Otero *v.* Gallegos, and (2) that the specifications were in fact sufficient. These specifications were not to be judged according to the law of pleading, but rather according to the law of notice. And under the law of notice only so much is required as is necessary to put the opposite party on his guard. From the very nature of the case notices could not be as specific as the minority contended, since they must be made within a limited time and often related to widely separated localities. The authorities cited by the minority are discussed, and also the cases of Washburn *v.* Voorhees and Vallandigham *v.* Campbell.

865. The case of Delano v. Morgan, continued.

When an illegal vote is cast by secret ballot the committee endeavor to ascertain from circumstantial evidence for whom, the vote was cast.

Discussion as to the kind of evidence required to show how the elector votes when he declines to disclose his ballot.

The State constitution making citizenship of the United States a requisite of the elector, persons deprived of citizenship by a Federal law for desertion were held disqualified.

[1] Speech of Mr. William Lawrence, of Ohio, Globe, p. 2784, second session Fortieth Congress. Mr. Kerr also debated this question. See p. 2776.

Discussion of the right of Congress by legislative declaration to deprive citizens of a State of their rights as electors.

Another question general in nature is discussed before proceeding to the points in issue. The majority say:

For whom a vote is given, by the laws of Ohio, is a secret properly known only to the voter himself, and he is never required to disclose it. This fact must therefore be often determined upon circumstantial evidence alone. To what political party a voter belonged, whose partisan he had been, whose friends claimed for him the right to vote at the time, what he said of his intention before and his act after voting, are circumstances which each claimant has endeavored to prove, and which the committee have considered in making up their verdict. In this action they are governed by precedent as well as principle. The same ruling obtained in the celebrated case from New Jersey, decided in 1840, and known as the "broad seal" case; and also in Vallandigham *v.* Campbell, decided in 1858. (See Bartlett's Contested Elections, pp. 28 and 233.) If it is not to be inferred, from this kind of evidence, for whom an illegal vote was cast, it can not, except in a few instances, be ascertained at all. Any number of illegal votes, once placed in the ballot box, either by the deception or connivance of the board, can never after be excluded unless the whole poll is rejected or the fraudulent voters voluntarily confess their crime. When, therefore, an illegal vote is shown to have been cast, the committee have endeavored to ascertain from circumstantial evidence, when positive proof could not be given, for whom it was cast, and deduct it from his count.

The minority say:

With some diversity in the rulings of the courts and of Congress on the subject, the better opinion seems to us to be, that the highest and best evidence, outside the record, for whom any elector intended to vote, is the testimony of the elector himself; but where the voting is by the secret ballot the elector can not be required to testify for whom he voted, and if he declines so to testify, it is then competent to show by other evidence for whom he voted. But in the latter case the evidence should be in character of the highest order attainable under the circumstances, and, in legal effect, so clear and strong as to preclude any reasonable doubt as to the fact.

Proceeding to the several questions on the issue of which the decision depended—

1. The majority thus state the first and most important question:

The contestant claim that 201 deserters from the Army and Navy of the United States voted for the sitting Member, and that this number of votes should be deducted from his count. Citizenship of the United States is one of the qualifications for an elector by the constitution of Ohio. By the act of Congress passed March 3, 1865, it is provided that "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report to a provost marshal, within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens." Under this law and the constitution of Ohio a deserter is not a legal voter in that State. In the argument before the committee by the counsel for the sitting Member this inference of the law was not disputed, nor the constitutionality of the law denied, but it was claimed that neither the election boards nor this House could pass upon the charge of desertion. This fact, it was claimed, must be first settled by trial and conviction in a court; in other words, that the disqualification did not consist in desertion, but in conviction of desertion. But the law does not so provide. Conviction is not required nor mentioned. It is the duty of an election board to pass upon the facts that constitute a disqualification, such as nonage, nonresidence, idiocy, insanity, color, race, bribery, etc. Why should they not pass upon the fact of desertion? Because, it is said, that is a crime. So is bribery, and yet the sitting Member asks that a considerable number of votes, alleged to have been cast under corrupt influences, should be thrown out, although there was no conviction or even trial, and the committee have complied with his demand. It makes no difference that the same facts which constitute a disqualification would, if heard before a court, constitute a crime. There are many instances where the law makes conviction in a court the ground of exclusion from the franchise, and then, of course, exclusion can only follow conviction. But when it makes the existence of a fact, as in this case, the ground of exclusion, that

fact must be passed upon by the officers of the election in the first instance, and by this House upon a contest. In the further argument of the case by the sitting Member himself it was claimed that the law was unconstitutional and void.

The majority proceed to say that the Supreme Court alone can declare void the law, which was passed by Congress and had the approval of the President. The House might override the law, but the committee did not recommend it.

The minority take issue on this question:

We hold in reference to all of the alleged deserters that they are legal electors, and that there is a signal failure, by legal evidence, to establish disqualification against any of them, because—

There is no proof of the trial and conviction of any of them for desertion by any court or tribunal of competent jurisdiction, civil or military, under the acts of Congress, March 3, 1863, or March 3, 1865, or any other laws. Without such conviction, even admitting the validity of those laws, their right to vote remains entirely unimpaired. It involves a violation of the most obvious rules of law, and principles of justice, and guaranties of liberty, and rights of the States, to deprive a citizen of so precious and sacred a franchise upon a vague charge, without due process of law, or a fair and impartial trial, with opportunity to the voter to make his defense. There is nothing in the acts of Congress that gives any countenance to the assumption that it is the intention of those acts to work any such results. The authors of them were not ignorant of the prohibitions and guaranties contained in the fifth and sixth articles of amendments to the Federal Constitution and other pertinent provisions of that supreme law. It is not competent for Congress to inflict punishment by the deprivation of rights upon the citizens of a State by mere legislative declarations. Neither can Congress, without usurpation, regulate suffrage in the States, by direct legislation to that end, or under the pretext of punishing men for alleged desertion. The regulation of suffrage belongs exclusively to the States, and this doctrine has been repeatedly affirmed by Congress in election cases and otherwise. It is also clearly established that Congress has no rightful authority to confer Federal judicial power in such matters upon the judicial tribunals of a State, and still less upon the quasi judicial tribunals organized under the mere municipal regulations of a State, such as election boards, none of whose duties can scarcely be said to be judicial at all.

The minority then go on to quote the decision of the supreme court of Pennsylvania in the case of Huber *v.* Riley, which arose under the act of Congress of March 3, 1865. The minority then proceed:

But it is claimed that, because under the constitution of Ohio no An can be a legal elector who, in addition to the other qualifications, is not also a citizen of the United States, therefore, Congress having control over citizenship of the United States, may decitizenize or withdraw citizenship of the United States from whom it pleases by mere legislative declarations, without due process of law, and that all persons thus deprived of citizenship of the United States at once cease to be citizens, or legal electors, of the State of Ohio. This doctrine is deemed most dangerous, if not monstrous, and violative of most valuable and fundamental principles in our Government. That provision in the constitution of Ohio was undoubtedly designed to prevent aliens from becoming electors in Ohio until they had first become, by naturalization, citizens of the United States. This was required on grounds of local State policy. But it is a perversion of terms to say that any person acquires the right of suffrage in Ohio by virtue of the laws of Congress. Naturalization does not confer the right of suffrage. That right is only conferred by the constitution and laws of Ohio. Persons are allowed to vote there because they possess all the qualifications thus prescribed. The right of suffrage at a State election is a State right, a franchise conferrable only by the State, which Congress can neither give nor take away. If, therefore, the act now under consideration is in truth an attempt to regulate the right of suffrage in the State, or to prescribe the conditions on which that right may be exercised, it would be held unwarranted by the Federal Constitution. In the exercise of its admitted powers, Congress may doubtless deprive an individual of the opportunity to enjoy a right that belongs to him as a citizen of a State, even the right of suffrage. But this is a different thing from taking away or impairing the right itself. Congress may also impose upon the criminal forfeiture of his citizenship of the United States—that is, of what Justice Story denominates his general citizenship; but that does not legally or necessarily deprive him of his

citizenship of the State, which is secured to him by the State constitution and laws, and is to be held on the terms prescribed by them alone. It is an integral part of the State government.

But we claim that the act of March, 1865, is unconstitutional in so far as it may be designed, by its terms, to work the disfranchisement of any of the persons alleged to be deserters in this case, because, to that extent at least, it is an ex. post facto law, and a bill of pains and penalties. In support of these objections, waiving further argument here, we refer to the luminous and conclusive judgments of the Supreme Court of the United States in the cases of Cummings *v.* The State of Missouri, and exparte Garland, 4 Wallace Reports, pp. 277, 333, which ought to be familiar to every Member of the House.

But it is attempted to evade the effect of these decisions by assuming that the failure to report, in some of these cases, after the President's proclamation, converted the previous desertion into a sort of continuing crime, for which continuance the elector may be disfranchised. It is not, and will not be, denied that the offense of desertion had been committed before the proclamation, if committed at all. It was therefore complete, and punishable in the manner prescribed under the previous laws. But the effect of the act of March 3, 1865, is to enlarge, extend the offense, to increase it by declaring it a continuing crime, which it was not before, which is the very definition of an ex. post facto law:

"An ex. post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different, testimony is sufficient to convict than was then required."

During the debate [1] this feature of the case was much discussed, and Mr. Henry L. Dawes, of Massachusetts, replying to the arguments of the minority, enunciated the view that the act of the deserter in not returning was a renunciation of citizenship.

866. The case of Delano v. Morgan, continued.

One of the election judges being disqualified by law to act as judge, the returns were rejected.

Although the State law forbade temporary closing of a poll on penalty of vitiating the election, yet the harmless act of suspending voting while the officers dined was overlooked.

Temporary absence of a portion of the election officers for purpose of dining was not considered ground for rejecting the poll.

A neglect of the law prescribing the boundaries of voting districts being sanctioned by eighteen elections, the House refused to reject the returns therefrom.

The parties, in proving fraud, having proved the votes actually cast, the House corrected the poll instead of rejecting it.

2. The majority of the committee thus discuss the second objection:

The contestant asks that the returns from Pike Township, Knox County, should be rejected because Salathiel Parrish, one of the judges of the election, being a deserter from the draft of 1864, was incompetent to act in that capacity. The constitution of Ohio provides, "that no person shall be elected or appointed to any office in this State, unless he possesses the qualifications of an elector;" and the statutes of that State further provide that "three persons to be elected township trustees, to have the qualifications of electors, shall act as judges of the elections." Under the act of Congress approved March 3, 1865, and the constitution and laws of Ohio, a deserter has not the qualifications of an elector, and is therefore incompetent to act as a judge of election. In the case of Howard *v.* Cooper (Contested Elections, vol. 2, p. 282) the returns of Van Buren Township were rejected because there were only two judges, when the law required three. If a return is untrustworthy when one of the judges is

[1] Globe, p. 2807.

absent, it is certainly more so if the vacancy is filled by a person disqualified to act. Two competent judges are certainly more reliable when acting by themselves than when advised, directed, and in part overruled by a third, pronounced by the law unfit for the trust. This principle is decided in Jackson *v.* Wayne (Contested Elections, vol. 1, p. 47). Whether the selection of this judge was intentional or unintentional can make no difference in the enforcement of the rule, but the committee are not authorized to conclude, from any of the surroundings of this case, that it was purely accidental. This law of the United States was very much criticised by those who were opposed either to the war or the mode of conducting it. Many persons insisted that it was unconstitutional and void, and might be safely disregarded by the judges of elections. Indeed, it was disregarded in many parts of this district. In this very precinct, as appears from the evidence, eleven deserters were allowed by the board, thus illegally constituted, to cast their votes. Whatever may be thought of the propriety or constitutionality of this law by individuals, it was certainly binding upon the electors of Pike Township until repealed by Congress or pronounced unconstitutional by the Supreme Court.

It is worthy of note in this connection that the required form of certificate to the poll book was essentially changed in this case. The special fact required by law to be given is altogether omitted. It certifies only to the number of votes cast, while the law requires that it should certify that they were cast by electors. The number is not so important, because that is also in the certificate to the tally papers, but that it should appear affirmatively that the persons casting these votes were qualified voters, is pointedly required by the statute of Ohio. There is great propriety in the law, and it ought in all proper cases to be enforced. The committee, mainly for the reason first stated, have rejected these returns.

The minority do not admit either the facts or law of the majority, but declare that even if Parrish was incompetent for the reasons alleged, he was still a de facto officer and the election was valid. In debate it was urged by the majority[1] that the de facto principle did not apply in the case of a man who had not the legal capacity to act.

3. The sitting Member claimed that the returns from certain townships should be rejected, because the voting was suspended for a short time while the officers were dining. The law of Ohio provided that after the polls were once opened in the morning they could not be closed for any purpose without rendering the election void. The majority say that while they can not sanction the custom of temporary adjournment, yet as no one appears to have been deprived of his vote, they say:

They do not feel warranted in depriving so large a number of electors of their votes on account of this unintentional and, in these cases, harmless errors of their officers.

The sitting Member also claims that the returns from the First Ward of the city of Zanesville should be rejected on account of the temporary absence of one of the judges and one of the clerks. The polls opened in this ward a few minutes after 6 o'clock in the morning and closed at 6 o'clock in the evening. The counting out immediately followed, making a continual session of thirteen or fourteen hours. Instead of closing the polls, as was done in the townships before referred to, the officers took turns in going out to their meals. They were absent for this purpose about thirty minutes each. However reprehensible this temporary absence may be, it does not appear to be brought within the case of Howard *v.* Cooper, cited by the sitting Member. In that case one of the judges was absent all the time, and his place was not supplied, as it might and ought to have been, by the voters present, and the returns are signed by less than the number of judges required by law. In this case the proper number of officers officiate at the election, count the votes, and sign the returns. A few votes may have been taken in the absence of one of the officers, but a list of them was kept, and subject to his inspection and criticism on his return. There being no proof or suspicion of unfairness or illegal voting in the ward, the committee are of the opinion that the votes should be counted.

[1] By Mr. Dawes, Globe, p. 2808.

The minority also concur:

The chief violations of the letter of the law consist in closing the polls for short periods during the dinner hour and in the too frequent absence of one or another of the officers from his place at the polls while open. The fact of such unlawful closing of the polls or of such occasional absence of an officer of the election, without proof of bad faith, fraud, corruption, or actual injury, we deem insufficient to call for the rejection of the polls in question.

4. The majority state a fourth question as follows:

The sitting Member further claim that the returns from Clinton Township, Knox County, should be rejected for the reason that the city of Mount Vernon and said township voted at one and the same precinct. The city of Mount Vernon was incorporated by a special act of the legislature in 1845. It lies in the center of Clinton Township, from whose territory it was taken. Under this special charter the township and city were authorized to hold all county, State, and national elections together, and from that time to this all such elections have been so held. In 1852 a general act was passed by the legislature "to provide for the organization of cities and incorporated villages," which makes each ward of a city an election district, and provides that the election shall be held at such places as the councilmen for such ward shall direct. Under this act no places for holding general elections in the city of Mount Vernon have ever been fixed. The law was not supposed to apply to this city so as to overrule its special charter. The city and township continued to hold their general elections together as before. Up to and including the election of 1866, fifteen State and four national elections had thus been held since the act of 1852. It is claimed now for the first time that the general election in the city of Mount Vernon, under the law of 1852, should be held separate from the township, in its own wards, and that the 1,100 voters of this precinct must be disfranchised as the penalty for so long misconstruing the law. The committee are inclined to think that the sitting Member is right in his construction of the law, considered as an original proposition, but as eighteen different elections preceding that of 1866 have been held since the act of 1852 without question, they do not feel justified in setting aside an election held in pursuance of a construction so long sanctioned by the authorities of the State.

The minority urged reasons of alleged fact why these returns should be rejected, and on the question of law argued:

No elections were held in the wards of the city. Their ballots were confused with those of the citizens of the township outside. It is no answer to say that the proper officers neglected to organize election boards in the city, and that the people therefore might vote at the township poll, because, in such case, it was the right and duty of the citizens at the time to select other officers and proceed to hold the election according to law. The citizens of the city had no right to vote at all out of their respective wards, and to do so was to commit crime under the laws of Ohio. If all these things can be done without vitiating elections, then election laws become useless and inoperative.

5. The majority say in relation to a fifth question:

The contestant also claims that Linton and Monroe townships, in Coshocton County, should be rejected. In each of these townships the ballot box was tampered with, and the number of votes returned for the sitting Member was larger than the number of votes cast for him, while the contestant's vote was proportionally diminished. In Linton the judges refused to allow certain friends of the contestant to be present while the votes were being received, as required by law; and in Monroe the township clerk refused to allow the friends of contestant to examine the retained poll book and ballots as the law requires, and the poll book returned to the clerk of the court was afterwards stolen. It is further objected to the returns from these townships that there is no certified poll book.

The majority further say that either the frauds proven to have been practiced on the ballot boxes or the absence of all certificates to the poll book might be considered a good reason for rejecting the returns altogether, but in proving the fraud the parties had proved the number of votes and for whom they were cast. Therefore the committee corrected the returns and did not reject the poll altogether.

The minority say as to Linton Township:

The law of Ohio requires that the names of the voters shall be entered upon the poll books, and that after the poll books are closed the poll books shall be signed by the judges and attested by the clerks, and the names therein contained shall be counted and the number set down at the foot of the poll book. At the election in question this was done, except the signing. The statute further requires that after the examination of the ballots shall be completed, the number of votes for each person shall be enumerated, under the inspection of the judges, and be set down opposite to their names, and that the judges of the election shall certify to the same, which certificate shall be attested by the clerks, all of which was done. (I Swan & Critch, pp. 533, 534, 535.) The object of the election law is to require the officers to certify the result of the election. That they have explicitly done in this case, and we submit have thus substantially, although not technically, complied with the law.

As to Monroe the minority say:

But the contestant alleges fraud in the officers of this election. The officers, of whom two were Republicans and three were Democrats, were all examined, and all testified that there was no fraud committed by them or with their knowledge. There was other testimony tending to excite suspicion as to the conduct of one of the officers, but it is, in our judgment, entirely insufficient to justify the rejection of the vote of the township, as established by the evidence and the admissions of the parties. It is impossible for us to perceive on what ground of law, or political or moral ethics, votes should be refused to any candidate for whom, by legal evidence, they are shown to have been cast. To reject such votes upon legal technicalities violates every precedent in Congress, and makes Congress assume the odious responsibility of electing Members of Congress.

6. As to Blue Rock Township the majority and minority disagreed as to the facts shown by the testimony.

The returns on their face had shown a majority of 271 for sitting Member. The majority of the committee, as a result of their conclusions, found this obliterated, and that contestant had a majority of 81. They therefore reported resolutions to carry this conclusion into effect. The minority found a legal majority of 742 for sitting Member.

The report was debated at length in the House on June 2 and 3, 1868,[1] and on the latter date a resolution of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 37, nays 39. Then the resolutions of the majority were agreed to, yeas 80, nays 38.

Thereupon Mr. Delano appeared and took the oath.

867. The Missouri election case of Switzler v. Anderson in the Fortieth Congress.

A canvassing officer may not reject returns which are regular on their face because the registration law may have been violated in the district in question.

As to the degree of intimidation required to justify a decision that a registration is void.

Entries on a registration list made by an officer not authorized by law to note the qualifications; of voters thereon are not evidence as to qualifications of persons registered.

On March 22, 1867,[2] the House by resolution extended for sixty days from the time prescribed by law the time for taking testimony in the Missouri contest of Switzler *v.* Anderson.

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[1] Journal, pp. 790, 791; Globe, pp. 2773, 2804–2809.

[2] First session Fortieth Congress, Journal, p. 93.

On March 23, 1868 [1], the report of the majority of the committee was submitted by Mr. Luke P. Poland, of Vermont, and on April 2 Mr. Joseph W. McClurg, of Missouri, submitted the minority views.[2] The case turned on the vote of the county of Callaway, which returned for contestant 1,463 votes and for sitting Member 163. The secretary of state of Missouri had declined to open and cast up the votes of Callaway County on the ground that there had not been a proper registration, and the certificate was issued to sitting Member, who had a majority of 178 votes in the remaining counties.

The provisions of the registration law are thus set forth in the report:

The governor of the State is to appoint a supervisor of registration in each county, who is also the president of the board of appeals and revision. The supervisor of registration in each county is to appoint an officer of registration in each election district. The officers of registration in each election district are required to attend on certain days prior to each general election for the purpose of registering the voters of such district. Every person applying to such officer of registration to be registered as a voter must first take and subscribe the test oath prescribed by the constitution of that State. Such officers of registration are also empowered to examine, on oath, every person applying for registration, and it is made their duty to diligently inquire and ascertain that such person has not been guilty of any of the disqualifying acts specified in the constitution. Such officers may also take other evidence as to the qualifications of the applicants, and also act upon their own knowledge. If he is satisfied that the applicant is duly qualified, and can honestly and truthfully take the test oath of the constitution, then he registers such person as a qualified voter. If the officer is not satisfied that the applicant is qualified, he is to enter his name upon a separate list of persons rejected as voters, and he is also to enter the grounds of the rejection, and note an appeal, if one be taken.

The superintendent of registration and the several district officers of registration constitute a board of registration, and are required to meet on certain days prior to the election to hear appeals from the several district registrars and generally to revise the registration in the several election districts in the county, and act upon objections to any who may have been registered as accepted voters.

After this action by the board of revision each distinct registrar is required to make out and certify two copies of the revised registration of his district, and deliver one to the clerk of the county court and one to the election judges of the district. No person is allowed to vote as "a qualified voter" unless his name appears as such upon the certified copy thus furnished the judges of the election.

All these provisions of the law in relation to the duties of registration and election officers are enforced by severe penalties for their violation; and all attempts to impede registration by threats, intimidation, or violence are similarly punishable.

By a supplemental registration act it is provided that the supervisors of registration in the several counties shall "make out and forward to the secretary of state, immediately after the completion of the registration in their respective counties and districts, a certified copy of the registration thereof, which shall contain the names of all registered voters; which certified copy shall be evidence of the facts therein stated, and may be used as such in any contested-election case, or other legal proceedings."

The governor appointed the registering officers in accordance with the above law. It appeared from the debate that the governor, the superintendent of registration for Callaway County, and the district registrars belonged to the party of the sitting Member.[3] The district registers made the registration, and each certified the copies of the registration as required by the law. The copies were duly delivered to the clerk of the county court and the judges of the several election districts as the

[1] Second session, Journal, pp. 561, 606; 2 Bartlett, p. 374; Rowell's Digest, p. 219; House Report No. 28.

[2] In this case it is worthy of notice that the sitting Member belonged to the majority party in the House and contestant to the party represented by the minority.

[3] Globe, p. 4085.

law required. The election was held November 6, 1866, but not until December 12, 1866, did Thomas, the county superintendent of registration for Callaway County, certify the registration of the county to the secretary of state. The copy which he then returned had attached to the registration of each district or township the certificate of the district registrar. He also attached a certificate of his own, wherein he set forth that the letter and spirit of the law was not carried out in any one of the election districts; that such widespread intimidation existed in the county that the law "was not carried out, as the certificates hereto appended show." The charges herein set forth were substantiated by certificates from three district registrars, who each certified that by reason of intimidation disloyal men not entitled to vote had been registered. Thomas also made entries against the names of 730 registered persons, such entries alleging disloyalty.

As to whether, on the state of facts as presented, the secretary of state had any right to refuse to cast up the votes given in the county of Callaway, the report says:

It does not distinctly appear that the secretary of state knew that these entries on the copy of registration had been placed there by Thomas, but it seems highly probable that he did, as it does appear that before Thomas made any certificate upon the registration, it was a matter of consultation and discussion between him and the secretary whether he could make such a certificate as he did make, and the effect of it, the secretary saying that if Thomas could make such a certificate, he thought it probable the whole thing could be thrown out.

Thomas had no legal right to make any such entries upon the copy; it was not in the performance of any legal duty that the laws of the State devolved upon him; his duty was only to make out and deliver to the secretary of state a copy of the registration of the county, containing the names of all registered voters, and to verify it by his official certificate. He had no right to interpolate other facts or statements into the copy, and he had no power to make his certificate evidence to any greater extent than to verify the copy as a true copy of the official registration. But assuming that the secretary of state did not know that these entries on the registration had been made by Thomas, and that he supposed they were made by the district registrars, or were made by the board of appeals, still, in the judgment of the committee, he had no right to regard them, and upon them set aside the vote of the county. The copy of registration shows that each of the persons against whose name such entry had been made was registered as a qualified voter, and that such registration had been sanctioned and approved by the board of appeals. If he had the right to suppose that they had this evidence before them, or that such charge was made against these persons, he must also see that notwithstanding this, they had been allowed to remain upon the register as qualified voters. The law nowhere authorizes the secretary of state to review the action of the registration officers and overrule their action. But it is not necessary to enlarge upon this view of the case, as the committee is satisfied that the secretary knew that these entries were made by Thomas with a view to support what he stated in his certificate, and that he ought to have treated them as a mere nullity, as much as if Thomas had entered against the same persons that they were minors or nonresidents.

Nor had the secretary any right to regard the facts stated by Thomas in his certificate, except so much as verified the copy. The law is entirely settled that statute-certifying officers can only make their certificates evidence of the facts which the statute requires them to certify; that when they undertake to go beyond this and certify other facts, they are unofficial, and no more evidence than the statement of any unofficial person. The statements or certificates of Turner, Turley, and Yount can not be regarded as having any legal validity whatever. The district registrars had exhausted their legal power of certifying when they had certified the registration of their respective districts; they were not officers to certify the county registration to the secretary of state, so that their statements are of no more force than any private persons. The law is equally clear that the secretary of state had no legal power to go behind the returns that were certified to him by the county clerks of the votes in the respective counties, or behind the returns of the registration officers. He was a mere canvassing officer, to open and count the votes that upon the face of the returns appeared to have been regularly cast.

The committee therefore concluded that the action of the secretary of state in rejecting the vote of the county was wholly illegal and unauthorized.

But the sitting Member further claimed that, even if the secretary of state might not reject the vote of Callaway County, the House might nevertheless do it, on the ground partly that the district officers of registration voluntarily neglected their duty and the requirements of the law, but mainly on the ground that the public and general sentiments of the people were so hostile to the proper enforcement of the registry law, and that such open threats were made against those who should attempt it, that the registrars were intimidated and prevented from doing their duty, and that loyal men were prevented from interposing objections against the registration of their disloyal neighbors. After weighing the evidence the committee conclude:

From the mass of conflicting opinion on this subject, and from the character of the threats proved, the committee comes to this conclusion, that there was no just and reasonable ground to fear personal violence or injury in consequence of appearing to make and support objections to registration; but that it was against the general and public opinion of the county that persons who had not committed disloyal acts should be disfranchised merely on the score of opinions and sympathies, and that probably many persons did refrain from making objections rather than encounter this general sentiment.

The committee does not regard this as any such unlawful interference with or obstruction of the law as furnishes ground to invalidate the registration. Nor does the committee regard any threats to seek redress against refusal of registration, by resort to legal tribunals by suit, as unlawful, so as to produce that effect.

The committee, upon all the evidence, can not find that there was any such misconduct or disregard of the law by the district registrars, or any such fear or intimidation excited, either upon the registrars or upon loyal men generally, as to preclude a fair and legal registration of this county, or to justify a total rejection of its vote for any such cause.

As to another feature the report says:

The committee does not understand that it is claimed for the sitting Member that if the vote of this county is to be counted, except so far as he shows the contestant received illegal votes, that his evidence shows a sufficient number to prevent the election of the contestant. Even striking out all those who had entries made against them by Thomas, more than enough are left to give the contestant a majority.

But those entries are not, in the judgment of the committee, any evidence of the disqualification of the person registered.

As has before been shown, Thomas had no authority to make them, and could give them no additional force by spreading them upon this copy of the registration of the county.

Thomas, upon inquiry as to the evidence upon which he acted in making these entries, says:

"In cases of bonded persons I took it from a list furnished me from the adjutant-general's office; those under the head of remarks, who were designated as enrolling disloyal, were taken from an enrollment made by Colonel Kerkel in 1862; under the head of other remarks, there were very few of them. The remarks made of this last class were made upon my own knowledge."

We have been cited to no law by which these lists of persons, as under bonds, or enrolled disloyal, are made evidence for any purpose beyond the specific one for which the lists were made; and upon what authority or evidence the lists were made is not shown. It is left altogether in doubt whether Thomas had the original enrollment made by the military authorities, or had only an unauthenticated copy. But however much weight the enrollment itself might be entitled to if produced in evidence here, the common principle of requiring the production of written evidence, and not receiving its contents from a witness, is a sufficient answer to bringing them in this manner. The attempt of Thomas to make facts "within his own knowledge," or "facts generally admitted," evidence, by thus entering them upon this copy of registration, is a still wider departure from all proper rules of evidence. The

evidence in the case shows that a few persons who had actually been engaged in the rebellion were registered as qualified voters; and giving full credit to the opinions of the witnesses of the sitting Member as to the number of persons in the county entitled to be registered under the law, it would appear that a large number must have been registered who were disqualified by reason of having sympathized with those engaged in rebellion.

The committee has already had occasion to express its judgment (which was sanctioned by the House) of the insufficiency of such general estimates for the purpose of proving either the qualification or disqualification of voters, and when such estimates are founded upon the sentiments and opinions of others, instead of tangible causes, they are still more dangerous as evidence.

Therefore the majority of the committee recommended resolutions declaring contestant elected and unseating sitting Member.

The minority, after reviewing the testimony as to intimidation, conclude:

Sufficient testimony has been quoted to satisfy the House that such a state of fear existed in Callaway County that there was not a proper enforcement of the law, but such a disregard that it is impossible to ascertain what should have been the legal vote in regard to numbers; disloyalty being triumphant, the loyal intimidated, registrars powerless, witnesses awed into silence, "a quiet election," and even "a quiet registration," because the disloyal controlled all as they desired.

Loyalty and justice demand that the election in that county (Callaway) be regarded as a nullity; that treason be thus rebuked, and those who failed in their efforts to destroy their government by the bullet be taught that, if permitted to control it by the ballot, they shall not be permitted to do so in open and flagrant violation of the law.

868. The case of Switzler v. Anderson, continued.

The House recommitted a report in an election case for inquiry as to a newly made charge of disloyalty against both parties.

The House, overruling its committee, held void an election in a county because of the intimidating influence of a preponderating disloyal element.

Instance wherein the House declined to follow its committee in awarding the seat of a Member of the majority to a Member of the minority party. (Footnote.)

The report was debated in the House on July 15 and 16, 1868.[1] On the latter day Mr. John F. Benjamin, of Missouri, in the course of debate, presented charges against the qualifications of the contestant as to loyalty.

It was objected that the pleadings made in accordance with the law had contained nothing affecting the loyalty of contestant, and that branch of the subject had not been investigated by the committee.

But the House voted, yeas 93, nays 46, to recommit the case with instructions to inquire into the charges of disloyalty made against the contestant, and also charges of disloyalty made by contestant against sitting Member.

On January 14, 1868,[2] the committee reported again, stating that files of a newspaper edited by contestant had been presented tending to show disloyalty, especially an editorial justifying the shooting of Colonel Ellsworth at Alexandria. The report cites the conclusions in the Kentucky case, and announces that the committee adheres to the conclusions of the former report. While many of the articles published in contestant's newspaper were mischievous in their tendency, yet

[1] Globe, pp. 4084, 4124–4133; Journal, pp. 1087–1089.

[2] Third session, House Report No. 7.

there was no such proof of disloyalty as to require his exclusion under the rule laid down in the Kentucky cases. The article relating to Ellsworth was repudiated by contestant, who declared that it was published without his knowledge.

On January 21[1] the second report was debated at length in the House. The opponents of the majority report urged that the House itself should reject the vote of Calloway County because the testimony abundantly showed that by far the larger part of the registered persons in that county were disloyal and not entitled to vote under the law of Missouri. This testimony was urged to be sufficiently conclusive, although this was vigorously disputed by those supporting the majority report.

A test vote was taken on the resolution unseating sitting Member. This was disagreed to, yeas 55, nays 89. Thereupon the resolution declaring contestant entitled to the seat was laid on the table. So the majority report was disapproved, and sitting Member retained the seat.

869. The Missouri election case of Birch v. Van Horn in the Fortieth Congress.

Extension of time of taking testimony in an election case.

Suffrage is a political right or privilege which, after it is granted, may be restricted or enlarged.

A new State constitution withholding suffrage from persons not able to take an oath of loyalty was held valid and not in the nature of an ex post facto law.

On March 22, 1867[2] by unanimous consent, the House agreed to a resolution presented by Mr. Joseph W. McClurg, of Missouri, providing that the time for taking testimony in the Missouri contested-election case of Birch *v.* Van Horn be extended for sixty days after the expiration of the time prescribed by law.

On December 18, 1867,[3] Mr. Luke P. Poland, of Vermont, from the Committee on Elections, submitted the report of the committee in this case. The sitting Member had been returned by an official plurality which in corrected form amounted to 525 votes.

(1) The principal contention by which the contestant strove to overcome this plurality related to a large number of rejected votes, of which 2,501 were for contestant and 9 for sitting Member. The constitution of Missouri, which had been in force since July 5, 1865, disqualified as voters all persons who had manifested adherence to or sympathy with the cause of the so-called Confederacy. This constitution also provided for a system of registration, and that as a prerequisite to such registration and to voting the citizen should take an oath proving his loyalty. The taking of this oath did not of itself insure registration, but the registration officers might institute inquiry, and if this inquiry were not satisfactory, might place the name on the rejected list. Persons on this rejected list might cast their ballots, but such ballots were marked and certified as rejected. The examination of this question of rejected voters divided itself into several branches.

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[1] Journal, p. 191; Globe, pp. 502–518.

[2] First session Fortieth Congress, Journal, p. 93; Globe, p. 289.

[3] Second session Fortieth Congress, House Report No. 4; 2 Bartlett, p. 205; Rowell's Digest, p. 215.

(*a*) A question as to the constitutionality of the provision, in view of the fact that another portion of the State constitution had been impeached. The report says:

The ninth section of the same article provides that, after sixty days from the time the constitution takes effect, no person shall be "permitted to practice as an attorney or counselor at law, nor after that time shall any person be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath."

Under this ninth section of the constitution arose the case of Cummings *v.* The State of Missouri (4 Wallace, 277), in which it was held by a majority of the Supreme Court of the United States that this provision, having the effect to deprive persons of the right to practice professions and pursue avocations lawful in themselves, in consequence of acts done prior to the adoption of the constitution, could only have been intended as punishment for such acts, and was therefore in essence and substance an ex post facto law, and therefore forbidden by the Constitution of the United States.[1]

The contestant claims that the same application of principles requires the same decision in relation to voters; that the virtual disfranchisement of persons who were voters under the previous constitution and laws of the State, but who are prevented from voting under the new constitution by reason of their inability to take the oath it requires, can only be regarded as a punishment for the act which stands in the way of taking the oath, and that the Constitution of the United States prohibits the infliction of punishment by subsequent legislation.

If such disfranchisement must be regarded as established for the purpose of punishing the persons thus deprived of the right of voting, it must be admitted to come entirely within the reasoning by which the above-cited judgment of the court is supported.

Your committee believe that the provisions of the new constitution of Missouri may be supported, so far as they require this oath of voters, without at all trenching upon the decision of the Supreme Court.

Each of the States of the Union have hitherto regulated suffrage within their own limits for themselves, and in such a manner as the people of the State deemed most conducive to their own interests and welfare. Suffrage is a political right or privilege which every free community grants to such number and class of persons as it deems fittest to represent and advance the wants and interest of the whole. No State grants it to all persons, but with such limitations as the interests of all and the interest of the State require.

When once granted it is not a vested, irrevocable right, but it is held at the pleasure of the power that gave it, and the State may, by a change of its fundamental law, restrict as well as enlarge it. When, therefore, the State of Missouri, in changing its constitution, saw fit to declare that the interests of the State and of the people of the State would be promoted by withholding the right of voting from all persons who could not take the prescribed oath, they exercised no greater or higher power than exists in every State.

870. The case of Birch v. Van Horn, continued.

4. A new State constitution being recognized by State authorities and by Congress in the reception of Representatives, the House will not question it in an election case.

Persons being denied the privilege of voting because of disqualification, their votes may not be counted by the House on general testimony as to their qualifications.

A registration officer who could not properly take the oath he did take as such officer was held a good de facto officer.

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[1] Although the whole committee concurred in the conclusions of the report, Mr. Michael C. Kerr, of Indiana, argued in debate in support of the objection that this provision of the State constitution was in the nature of an ex post facto law. (See Globe, p. 401.)

(*b*) The committee also conclude:

On the 1st day of July, 1865, the governor of the State issued his proclamation declaring the constitution adopted, and in force from and after the 4th day of the same July. Since that time the new constitution has been regarded by all the departments of the State government as the fundamental law of the State; all the legislation of the State has been conformed to it; all the officers of the State, and of all municipal subdivisions of the State, have been elected and held office according to its requirements, and the State has been represented in both Houses of Congress without question as to the validity and binding obligations of this constitution.

The contestant now claims that this State constitution, so far at least as it affects elections of Members of Congress, should be held a nullity, and as if it had never been adopted by the people of the State.

This is claimed upon the ground that the convention by whom it was framed exceeded their powers given by the legislative act by which the convention was called, and that this was not cured by its subsequent adoption by the people, because, in submitting it to a vote of the people, those only were allowed to vote who could take the oath prescribed in the second article of the constitution, the effect of which was to preclude large numbers from voting who had been previously allowed to vote. The committee have not deemed themselves at liberty to enter upon this inquiry.

It being conceded that by every department of the State government of Missouri this constitution is recognized and acted upon as the fundamental law of the State, and by Congress in the reception of Representatives from the State, it is in our judgment too late for this House to inquire as to the regularity of its formation or adoption by the State.

(*c*) Contestant also claimed that even if the State constitution were valid, the persons whose ballots were rejected were nevertheless legal voters under all the requirements of the new constitution. In support of this he produced general testimony. Thus, taking the list of rejected voters at a certain place, a witness would be introduced to swear that he did not know any one of them "who was disloyal within the meaning of the terms of the new constitution of Missouri."

The committee say:

The evidence of the contestant tends to show that the restrictions and disqualifications created by the new constitution were very rigidly enforced, and some instances of partisan unfairness are shown, but to what extent this operated to exclude lawful voters from registration, and who such voters were, is left wholly vague and uncertain. The only evidence in the case is that taken by the contestant, and it is probable that much of the appearance of unfairness would have been dispelled if evidence had been taken by the sitting Member.

If the class of evidence introduced by the contestant had been the only means within his reach to establish the right of the persons rejected to be registered and vote as qualified voters, there would be very plausible ground to claim that enough ought to be presumed from it to at least vacate the election, unless what is proved by the contestant was rebutted by evidence from the other side. But the contestant was not confined to this proof or evidence of this general nature at all. The provisions of the constitution and laws of Missouri furnished him peculiar facilities to establish his case, if he relied upon proving that legal voters were excluded from registration and voting as qualified voters, in as much as the rejected list of the registers and the rejected votes furnished the names of the persons and the candidates for whom they voted.

Under these circumstances the committee consider they have no right to rely upon such vague and general evidence as has been furnished, or to draw presumptions and conclusions from it when it was clearly within the power of the contestant to have established the facts; he asks us to presume by dear and exact proof if such facts exist.

The committee consider, also, that in order to unseat a Member of this House who has the regular certificate of election, and who is conceded to have received a majority of several hundred votes of the votes received and counted, they should be able to report whose votes were excluded that ought to have been counted; that it would not do for the committee or for the House to say that out of 2,500 rejected voters, all of whose names are unknown, they are satisfied that enough were legal voters and ought to have been counted to give the contestant a majority.

(2) The committee thus discuss a question relating to an irregularity of certain poll books:

The contestant also claims that all the votes cast in the county of Clinton, except in the township of Concord, should be excluded by reason of the insufficiency of the poll books returned by the judges and clerks of election in the several townships.

The statutes of Missouri require that the judges and clerks of election, before entering upon their duties, take the oath required by the constitution, and also an official oath prescribed by the statute. The statute gives a form for a poll book, in which form it is stated that the judges and clerks were duly sworn previous to entering upon the duties of their offices. The committee regard this as a statute requirement that should appear upon the poll books returned.

Jeremiah V. Bassett was clerk of Clinton County at the time this Congressional election was held. He testifies that the poll books from the townships of Jackson, Shoal, Lafayette, Hardin, and Platte contained no evidence that the judges and clerks of election therein had taken the required oaths. Robert W. Musser, who was deputy clerk during the same time, testifies to the same fact.

These townships gave 375 votes for Van Horn and 189 for Burch. The committee are satisfied that this defect existed in the poll books of these townships, as stated by these witnesses (provided it be admissible to show such fact by paxol evidence), and if for that cause they ought to have been excluded from the count, then the above number of votes should be deducted from the votes of both candidates, respectively, making a difference of 186 votes in favor of the contestant.

(3) As to the competency of an officer of election:

The contestant also introduced two witnesses whose testimony tended to prove that Francis D. Phillips, supervisor of registration for Clinton County, induced men to enlist in the rebel army, and so could not truthfully take the oath required by the constitution of Missouri to entitle him to vote or hold office. As these witnesses are not contradicted, the committee are compelled to find the fact proved, if it be of any legal value.

The supervisors of registration for each county are appointed by the governor, and are to be qualified voters. These county supervisors appoint registers in each election district in the county, who are also to be qualified voters.

There is no evidence but that Phillips was in every way legally competent to hold this office, except his inability to take the oath; nor is any question made but that he had, in fact, taken all the necessary oaths and other legal steps to make him a qualified voter; that he was duly appointed to this office by the governor, and had taken all the oaths required by his official station, and had actually assumed and performed the duties of supervisor. The committee are of opinion that his acts as such supervisor can not be regarded as void, so as to affect the legality of the votes given at the election; that, having come into the office under all the forms and requirements of the law, he is at least a good officer de facto, whose acts are not to be questioned in a collateral proceeding, but only by some proceeding bringing his title to the office directly in question.

The contestant's evidence tends to establish that Anthony Harsel, supervisor of registration in Clay County, in 1861 was a friend and sympathizer with the Southern rebellion; and, uncontradicted, the committee think it sufficient to establish the fact; but, as in the case of Phillips, we regard him as being a good de facto officer, whose acts can not, in a collateral proceeding, be held invalid by reason of any defect in his official title.

During the debate Mr. Poland said[1] it would be going a great way, in consequence of this defect in the supervisors, to vitiate the appointment of the deputy registrars, and thus vitiate the entire election, and stated that the committee were unanimous on this point.

The report was debated on January 8, 1868,[2] both contestant and sitting Member being heard, and the resolution confirming sitting Member's title to the seat was agreed to without division.

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[1] Globe, p. 389.

[2] Journal, p. 159; Globe, pp. 389–403.

871. The Missouri election case of Hogan v. Pile in the Fortieth Congress.

The use of an unofficial compilation of a registration list to aid in reference during the voting was held not to vitiate the poll.

Registration being a condition of voting, the House declined to reject a precinct whereof the registration list was not shown to have been returned as required by law.

On June 18, 1868,[1] Mr. Burton C. Cook, of Illinois, from the Committee on Elections,[2] submitted the report of the majority of the committee in the Missouri case of Hogan *v.* Pile. The questions arising in this case were largely of fact arising from the workings of the registration law of Missouri; but a few questions arose involving principles.

The sitting Member had been returned by a majority of 218 votes, which the contestant assailed as produced by frauds and irregularities. The questions involving the determination of principles were:

(1) The law of Missouri required each voter to be registered, and that no voter who had not been registered should vote. The law further provided:

SEC. 12. Immediately after the closing of such register the officer of registration shall make and certify two fair copies, alphabetically arranged, of the names of the qualified voters, as ascertained and determined by said board, one of which he shall deposit with the clerk of the county court on or before the next ensuing Saturday, and the other he shall deliver at or before the hour of 10 o'clock a. m. of that day, to some one of the persons who shall have been appointed to act as judges of the next ensuing general election in the election district for which the list was made, and shall take his receipt therefor. * * * The person to whom the said list shall have been delivered shall produce the same at the place of voting, and deliver it into the possession of the judges of the election at the time of opening the polls on the day of the ensuing general election.

* * * * * * *

SEC. 17. When any person shall have voted the judges of election shall, at the time, write opposite his name on the list the word "voted."

In one election precinct the provisions of this law were carried out as described in the report:

The registry lists certified by the officer of registration were alphabetized simply by the first letter of the name. In some instances more than a hundred names were recorded under a single letter. To remedy the inconvenience occasioned by the imperfect manner in which the list was arranged, and the consequent delay finding the name of the voter and receiving the vote, the judges of election of the thirtieth election precinct, on the day and night prior to the election, caused the certified list to be copied, and in the copy made the names were alphabetized by the first two letters, so that the name could be more easily and readily found; the names were numbered on the certified list and the numbers were transcribed on to the copy, so that where the name was found on the copy, by the aid of the number it could be more readily found on the certified list. (Testimony of John Green, Mis. Doc. 37, p. 138.) Both the certified list and the copy made by the judges were present, and were used by the judges and clerks during the election. There is no evidence before the committee showing that the copy made by the judges was used to the exclusion of the certified list; the returns were made on the certified list. (See testimony of G. Sessingham, p. 139, also the testimony of Charles P. Gould, p. 137, and of Milton H. Wash, p. 57.)

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[1] Second session Fortieth Congress, House Report No. 62; 2 Bartlett, p. 281; Rowell's Digest, p. 216.

[2] Minority views were presented by Messrs. John W. Chanler, of New York, and Michael C. Kerr, of Indiana.

The committee are of opinion that the use of a more perfectly arranged copy of the certified registration lists by the judges, in connection with the original, for the purpose of facilitating the finding of the names of voters on the certified lists, and consequently making it possible to receive a much larger number of votes, did not render void the election, and if done in good faith was no more a violation of the law of Missouri than it would have been to have employed an expert clerk to have found the names of voters upon the certified list without delay, and thus have expedited the voting.

The minority criticise the secondary list as made up by a partisan of sitting Member who was not a sworn officer, and not properly supervised by sworn officers. They say:

This new list got up by Green, etc., is said to have been a "true copy" of the original book or "list" furnished by the registrar, yet no one testifies to any examination and comparison thereof, except, as Mr. Green says, by counting the names on both lists and finding them to agree in number. Can the committee sanction this method of comparison? Would counting the words verify the copy of a bill, a deed, or any legal instrument? Surely the members of the committee will not try to legalize a list of voters compared by merely counting the names. Further, the list used was not authenticated. The law requires the registrar "shall certify to the list of voters;" this is its authentication. Could it be a legal copy, if even every name on the original was on it, without this authentication? Did any court ever admit as evidence a copy of a deed, even though containing every word of the original, when there was no authentication thereof?

More than this, did ever court admit as evidence a paper purporting to be a copy of an original one, made evidence, which not only was not authenticated, but was proven never to have been compared with the original of which it purported to be a copy? Nay, more, when the purported copy has been challenged as fraudulent, but is not then produced for comparison with the original, would any court or jury substitute such copy? Assuredly they would not. But the evidence is clear that this official record was substituted by another, claimed to be a copy, but by no one examined and compared, not even certified by any one as true. To admit such would be to ignore all the practice of the past.

The minority and majority then join issue as to whether or not the facts showed the secondary list to have been made and used for purposes of frauds. There were certain discrepancies, but the majority insisted that they were explained by errors arising innocently from writing foreign names by sound. The minority combated this theory, pointing out that the party friends of sitting Member controlled the registry.

(2) Contestant also assailed the returns from the thirty-seventh election precinct. The report says:

It is claimed by contestant that the return from this precinct should be rejected, because the original registry list was not returned to the office of the county clerk. The law requires that the officers of registration shall, "as soon as may be," deposit with the clerk the original books of registration. The only evidence before the committee that the original registry list was not returned is as follows: "No. 21 registration book not returned to clerk's office. James C. Moody, judge." This certificate is without date, and there is no proof before the committee when it was made.

The next paper is a copy of poll book of the same election precinct, certified by S. W. Eager, clerk of the county court, which certificate is dated January 3, 1867. The election was held on the 6th day of November, 1866. Even if there was any proof before the committee that the original list had not been returned to the county clerk by January 3, 1866, the committee are not prepared to say, in the entire absence of proof of the circumstances of the case, that there was such violation of the law as would render the election void.

In support of this position the report cites the case of Brockenborough *v.* Cabell.

The minority cite the law:

SEC. 14. The officers of registration shall, as soon as may be, deposit with said clerk the original books of registration, which shall be kept and preserved among the records of the court, except when otherwise disposed of, as hereinafter directed.

After stating the facts, the minority say:

Now, we ask, upon what evidence does the majority of the committee act in receiving as legal votes these 164 from district No. 37? There is none, for there can be no legal vote without registration, and there is absolutely no evidence of registration in that district. This conduct is in most noticeable contrast with the rejection by the majority of the committee of certain precincts in Kentucky, in the case of McKee *v.* Young, where the grounds of objection in no way touched the merits or fairness of the election.

The sitting Member, in his verbal argument before the committee, admitted that he had no doubt that when Eager, clerk, made the certificate the book had not then been returned; but, when asked by the chairman of the committee if he knew it had been returned since, he said he did not know whether it had or not.

If it had been returned, he could have procured a copy, and thus refuted the allegation. Failing to supply the lack, and especially when his own party friends, the registrar and the county clerk, are the only ones that could supply the list, the case on all principles of justice must be given against him, and this precinct ought to be thrown out.

In the case of Blair *v.* Barrett the contestant alleged the absence of evidence on the record that the judges had been sworn. It was held by the committee and the House that it was the duty of the contestee to supply this evidence, failing in which this precinct was thrown out and Barrett lost his seat. This ruling has been since affirmed. This has frequently been held a necessary part of the return. The Missouri law makes the evidence of registration essential to the right to vote, and the preservation of this evidence in a given office an imperative requirement. Can the committee set aside this provision?

The majority of the committee have held in the recent case of Delano *v.* Morgan that while the the law of Ohio specifically required the return should show that all who voted were "electors;" and as this designation was omitted in the certificate of return, the omission was fatal. The Missouri law requires registration, requires the evidence thereof to be filed with the clerk, requires the voter's name to be marked "voted" on the list, and this list to be returned. None of these absolutely mandatory provisions are complied with, and yet the majority of this committee fail to see this fatal omission, which practically shields a party friend.

Presuming the attention of the majority had not been directed to the peculiar reasons of this requirement, we have given to it this examination, and, in accordance with all analogous precedents, reject the poll, and shall therefore, in our summary of result, deduct it from each of the parties. The vote at that precinct was: Pile, 94; Hogan, 69.

872. The case of Hogan v. Pile, continued.

Evidence taken ex parte is not considered in an election case even when given by electors as to their votes.

The State law requiring the polls to be open from "sunrise to sunset," and the polls being closed at sunset and then reopened, the votes cast after sunset were rejected.

(3) As to certain evidence taken ex parte the report concludes:

During his concluding argument before the committee the contestant presented the affidavits of 42 persons showing that they voted for him, and it is insisted that the poll books show that each of these persons were counted for the sitting Member.

The committee can not consider these affidavits as evidence, because it was admitted by contestant that the affidavits were wholly ex parte and taken without any notice whatever having been given to the sitting Member and because the same were taken without any order having been made for that purpose after the time allowed by law for the taking of the proof had expired. * * * If, however, the testimony was admissible, it would be very far from conclusive.

The minority admit that this evidence is not strictly legal, but contend that from its nature it should be admitted.

The clerk, being by law the custodian of election returns, ballots, etc., on the mandate of the circuit judge, in accordance with the law of Congress, examined and certified the numbers on the ballots counted for each candidate as returned by the judges of election, and by comparing these numbers with corresponding numbers on the poll list, it is readily perceived for whom each party voted. Many well known and influential citizens are by this comparison found apparently voting for the sitting Member, their ballots being counted for him. Publication was made in the newspapers of St. Louis of this fact, and these gentlemen, to the number of about 100, sent their affidavits to the contestant to same him of the fact that they did not vote for the sitting Member, but did vote, each and all of them, for contestant.

This is simply a question of fact. The tickets were printed; party lines were very closely drawn; these gentlemen are vouched for as intelligent lawyers, bankers, merchants, doctors, mechanics, of well-known political proclivities. When they swear they knew for whom they voted, and when the official certificate of the clerk of the county court certified to the numbers as counted for the sitting Member, and numbers corresponding to each of these names are found to have been counted for the sitting Member, and hence made fraudulently to increase his apparent vote, cross-examination could not change these facts.

(4) The election law of Missouri required the polls to be opened from "sunrise to sunset." In precinct No. 26 certain votes were taken after sunset. The majority decline to decide whether these should be counted or not, but as to two other precincts they say:

The committee are of the opinion that the votes which were given at precincts Nos. 27 and 28 after sunset ought not to have been returned or counted, because in each of those precincts the polls were regularly closed at sunset. (See testimony of John Conzelman, pp. 132, 133; Henry Gambs, p. 135; George B. Stone, p. 157.) After the polls were once regularly closed at sunset it is obvious that they could not be legally opened again during the evening with only partial notice to the voters; such a course would open the door to any fraud that might be attempted.

The minority contend for the rejection of all these returns:

The majority do not undertake to settle the legality of this vote, nor indeed to express any opinion upon it, yet retain the return for the twenty-sixth precinct, because there only the voting was continued without any formal closing of the polls. We are unwilling to unite in this acquiescence, believing it would make a very bad precedent, and lead to injurious consequences. The election law of Missouri requires the polls to be opened "from sunrise to sunset." The question of the legality of votes taken after sunset, as far as our knowledge goes, has never been adjudicated in that State; indeed we do not find that any after-sunset vote had ever before been counted in the State. When the return was made from the twenty-sixth precinct of a night vote, the clerk and judges, passing on, or rather footing up, the returns from the precincts, heard an argument from one gentleman on the subject; after which the clerk and one county judge agreed to receive this return and certify it up to the secretary of state. The other county judge united in the certificate to the general return, but refused to certify the "after-sunset vote," and entered his protest against its reception. (See testimony of John F. Long, county judge, p. 33.) The other election judges generally refused to count and certify the night vote, but when at last they did send it up to the clerk from the twenty-eighth precinct he refused to receive and include it in returns. The secretary of state, in his official certificate filed with the committee, evidently does not regard the night vote as of equal validity with the day vote, for he enumerates them separately, and specifically presents the former in red ink, in contradistinction with the latter, thus:

William A. Pile received 6,587 votes before sunset; 141 votes after sunset; total vote before and after sunset, 6,728.

John Hogan received 6,417 votes before sunset; 93 votes after sunset; total votes before and after sunset, 6,510.

Assuredly if he deemed after-sunset vote as legal as the day vote, he would have made no such distinction. The undersigned deem the argument in contestant's brief on this subject conclusive; but are unwilling, even tacitly, to admit the legality of such votes.

We state freely, if the night vote is to be counted at all it should all be counted, and the evidence is clear to our minds that the contestant would have a large majority; but, unwilling to open such a door to fraud, we, without any hesitation, reject the whole after-sunset vote, and trust the majority will, on further examination; adopt our conclusion.

(5) There was also a sharp difference between the majority and minority as to certain names on the voters' lists that were not found on the registry list, the majority contending that this was the result of innocent errors and the minority charging an intention to commit fraud.

As a result of the examination the majority found that sitting Member's majority had not been assailed successfully, while the minority contended that contestant had been elected by 469 majority.

The report was debated on July 22 and 23, 1868,[1] and on the latter date the resolution of the minority declaring contestant elected was disagreed to, yeas 32, nays 90. Then the resolution of the majority confirming the title of sitting Member to the seat was agreed to without division.

873. The Missouri election case of Switzler v. Dyer in the Forty-first Congress.

Discussion as to authority of a secretary of state, whose duties are ministerial only, to reject returns because of violations of registration laws.

Returns being tainted by obvious fraud and the custodian of the ballots having refused to show them, the returns were held valueless and rejected.

The returns being rendered untrustworthy by action of acting judges chosen in places of judges kept from the polls by intimidation, the poll was rejected.

The House, overruling the committee, declined to count the vote of a county wherein by fraudulent registration many disqualified persons had been put on the voting lists.

On March 4, 1869,[2] at the organization of the House, the name of David P. Dyer, of Missouri, appeared on the Clerk's roll. As soon as the roll had been called a question was raised as to Mr. Dyer, but on March 5 the House voted, yeas 163, nays 4, that he be sworn in, there being no question as to his prima facie right.

On June 29, 1870,[3] Mr. John C. Churchill, of New York, from the Committee of Elections, submitted a report in the case of Switzler *v.* Dyer, of Missouri. The official majority of the sitting Member in the district as finally established was 432 votes. But of the votes as actually cast the contestant received a majority of 710 votes. The transactions bringing about this change are thus described:

The secretary of state of Missouri, upon affidavits attacking the registration in the county of Monroe, rejected the returns from that county, and a majority of 432 votes being thereby shown for the sitting Member, he gave the latter a certificate of election, upon which he was admitted to his seat in the Forty-first Congress, pending the contest, notice of which had been served upon him by Mr. Switzler. The duties of the secretary of state, under the laws of Missouri, in respect to certifying the election of Mem-

[1] Journal, pp. 1146, 1158, 1159; Globe, pp. 4335, 4381–4382.

[2] First session Forty-first Congress, Journal, p. 10; Globe, pp. 3, 10.

[3] Second session Forty-first Congress, House Report No. 106; 2 Bartlett, p. 777; Rowell's Digest, p. 250.

bers of Congress, are as follows: The judges of election at each voting precinct are required, within two days after the election, to transmit one of the poll books kept by them (and which is required to contain the names of the voters, of the persons voted for, the office, and the number of votes given to each candidate, duly certified by the judges of election) to the clerk of the county court, who, within eight days thereafter, publicly, in the court-house, and with the assistance of two magistrates of the county, is required to examine and cast up the votes given to each candidate, and in the case of Members of Congress and of the State legislature and other State officers, within two days thereafter, to send by mail, closely sealed, and not to be opened until the day fixed for the counting of the votes, an abstract of the votes given for those officers to the secretary of state.

Thereupon, "within fifty days after such general election, and as much sooner as the returns shall all have been made, the secretary of state, in the presence of the governor, shall proceed to open the returns and to cast up the votes given for all candidates for any office, and shall give to the person having the highest number of votes for Member of Congress from each district certificates of election, under his hand, with the seal of the State affixed thereto." (General Statutes of Missouri, 63, secs. 24–32.)

It will be seen from the language of the statutes above quoted that the duties of the secretary of state are ministerial only, and not judicial, and they are so held by the supreme court of Missouri—in accordance with the general current of authority, both in this country and in this House—in the case of the State ex rel. Charles C. Bland *v.* Francis Rodman, secretary of state.

The majority of the committee further conclude:

It is true that in at least two cases beside the present (Butler *v.* Lehman and Morton *v.* Daily, Bartlett's Contested Election Cases, 353, 402), both of which arose in the Thirty-seventh Congress, where municipal officers assumed to act judicially and to reject returns believed by them to be affected by fraud and thereupon issued certificates to persons who would not have been otherwise entitled to them, such certificates were held sufficient, as in this case, to entitle the holder to the seat, prima facie, and pending the contest. But such action being without authority of law has no weight in deciding the contest upon the merits, when, if necessary, we go back of all certificates and inquire into the action and right of the individual voter at the polls; and it has been referred to here only as a part of the history of this case and to explain how the contestant, having a majority of the votes cast, happens to occupy the position he does in this contest.

The minority views, presented by Mr. John Cessna, of Pennsylvania, say:

It is not necessary to discuss the power or authority of the secretary of state to reject the vote, because it is admitted by the majority of the committee that this question does not enter into the case. But it appears from a letter of the secretary of state, filed by the contestant himself as evidence (p. 62 of the record), that the secretary of state awaited the action of the people's representatives in the legislature before he refused to open and cast up the vote of Monroe County (p. 61):

"The letter from Colonel Switzler is received. I have left the whole matter of Monroe and other counties to the legislature for decision. I have not thrown out any county, but simply refuse to cast up until the legislature decides that I shall do so. Not until the legislature has acted upon this matter can I give out copies of documents relating to this subject.

"Respectfully,

"FRANCIS RODMAN, *Secretary of State.*"

It can not well be denied that if the case of Switzler *v.* Anderson, in the Fortieth Congress, was correctly decided, then the conclusions of the majority of the committee in this case are wrong. The same contestant was here in that case claiming admission on the ground of the rejection of the vote in Calloway County for reasons similar to those now urged for the rejection of Monroe County in 1868.

The case turned, therefore, on the question whether or not the vote of Monroe County should be counted. The majority report says:

The reasons given why it should not be counted are that the superintendent of registration of the senatorial district of which that county is a part corruptly agreed, as is alleged, with the political friends of the contestant that he would appoint registering officers in his district who would register all white male citizens over the age of 21 years without regard to their qualifications, as fixed and prescribed by the constitution and laws of Missouri, on condition and in consideration that he should receive the

support of the political friends of the contestant for the office of sheriff * * *; and that, in pursuance of this agreement officers of registration were appointed who would be likely to carry out this agreement; and a large number of persons, disqualified under the law, were permitted to register and to vote in the county of Monroe.

The state of facts in this county was examined at length and carefully to determine whether the registration was fraudulent, the majority contending that it was not, and the minority that it was.

Both the majority and the minority concurred in rejecting the polls at two places:

(*a*) At Salt River Township in Adrian County:

The place designated by the county court for holding the election in this township was the tobacco factory on the public square. Being unable to get in here, the sheriff made proclamation that the election would be held at Ricketts's office, on the square, to which place the people present went; and the judges of election not being present, the voters present chose judges, to whom the sheriff delivered the ballot box and poll books, and also a list of qualified voters, certified by the clerk of the county court (pp. 50, 63, 77). Thus far the proceedings seem to have been regular, although there is evidence to show that it was the intention to have held such an election by judges other than the legal judges, had the latter been present in time to open the polls at 7 a.m., as required by law (p. 205).

The list of qualified voters for this township will be found on pages 201–203 and contains 217 names; but the poll list kept at this election, which is found on pages 192–194, shows that 519 votes were received. The judges further, in making this return, certify that the contestant received 146 votes, the sitting Member 71, or the precise number of qualified voters. It would be very unusual, although possible, that the entire list of persons registered as qualified should have been present to vote; but it is made the duty of the judges of election (Laws of Missouri, 1868, p. 136, sec. 17) to write the word "voted" after the name of each person on the list who shall vote, and on producing the list used at this poll (pp. 203–205) it is found that 74 names have no entry against them (p. 81), showing that they did not vote on that day. Three of those whose names are on the qualified list are called as witnesses—Alfred Hambleton, p. 72; W. W. Cedon, p. 70, and Miles J. Burns, p. 76—and swear that they were not present and did not vote at this poll on that day. There was still a method by which the real vote of the qualified voters of that township could have been ascertained. The ballots themselves were yet in the hand of the clerk of the county court, and so marked, if the law had been complied with, as that the ballot of each qualified voter who voted could be identified. The clerk of the county court, who was the political friend of the contestant, and of the sheriff, who seems to have manipulated affairs at that poll was summoned as a witness by the sitting Member and produced the ballots, but refused to open them or permit their examination. The returns themselves we think so tainted by obvious fraud and violation of law as to be valueless, and, not being permitted to be corrected by the means which the law of Missouri provides, should be rejected.

(*b*) In Wilson Township:

On the morning of the day of election in this township word was sent to two of the judges of election appointed by the board of registration that it would be dangerous for them to go to the election. The circumstances attending the receipt of these messages were such that they thought it advisable not to go to the polls until they could gather some of their friends to accompany them armed. They did so, and were thereby so delayed that when they reached the polls the time for opening them was passed, and other judges had been chosen by the voters present. The circumstances are such as seem to show that this result was one object of the messages they had received (pp. 65, 80). The list of qualified voters in this township will be found at pages 204–205, and numbered 78. But the poll list shows that the acting judges of election at this poll received 151 votes, of which they marked 93 as accepted, and they returned 91 votes as cast for Member of Congress, 49 for the contestant and 42 for the sitting Member. But a comparison of the list of qualified voters with that of persons who voted shows that 15 of the former did not vote, so that while only 63 qualified voters in the district have voted, 91 votes are returned as having been cast by qualified voters for Members of Congress.

The clerk of the county court in this county having already, in the case of Salt River Township in the same county, refused to produce and open for inspection the ballots cast at this election, it was

not necessary to renew the attempt to get access to the ballots in this case, and the vote of this township, for the same reasons as in the case of Salt River, should be rejected, reducing thereby the vote of the contestant to 6,091, and of the sitting Member to 5,463, and the majority of the former to 628.

The majority of the committee reported resolutions to unseat sitting Member and seat the contestant.[1]

The report was debated on July 7,[2] the question of fraud on the part of the registration officer entering into the decision largely. On behalf of the minority of the committee resolutions were offered declaring sitting Member entitled to the seat and contestant not elected. The resolutions of the minority were substituted for those of the majority by a vote of yeas 109, nays 55.

So the recommendations of the majority of the committee were overruled, and the sitting Member retained the seat.

874. The Pennsylvania election case of Myers v. Moffet in the Forty-first Congress.

Reference to a discussion as to the validity of certain naturalization papers.

Where election officers receive illegal votes with a guilty knowledge that they are illegal the entire poll is rejected.

Votes taken before the legal hour for opening the polls, by officers having fraudulent intent, are valueless.

Instance wherein the Elections Committee, in passing on the intent of election officers accused of fraud, took into account the conduct of those officers at a subsequent election.

Disturbance at the polls, incident to the removal of a contestant for the office of election judge, does not vitiate the poll.

On April 6, 1869,[3] Mr. Job E. Stevenson, of Ohio, from the Committee on Elections, submitted the report in the case of Myers *v.* Moffet, from Pennsylvania.

The official returns gave sitting Member a majority of 159. The majority of the committee found frauds and irregularities sufficient to overturn this majority and produce a majority of 647 for the contestant.

A question as to the validity of supreme court naturalization papers was entertained at considerable length in both the report and the minority views, but did not enter into the decision of the contest.

The issues bearing on the result were three:

(1) The majority of the committee decided that the polls of the seventh division of the Seventeenth Ward of Philadelphia should be rejected because the election officers disregarded certain provisions of law claimed to be mandatory. The report says:

Two hundred and forty votes might have been illegally cast for either candidate in a large district without causing the loss of more than that number to either, when proved, but 200 or more votes can not be received by election officers with a guilty knowledge that they were illegal, or in gross violation of the election laws, which they were bound to consult, without entailing a stronger penalty. In such cases not only State courts but legislatures and Congress have not hesitated to declare the whole poll void and of no effect, except as to such votes as either party chooses to save by proof of their legality.

[1] It should be noted that sitting Member belonged to the dominant party in the House and contestant to the minority party.

[2] Journal, p. 1172; Globe, pp. 5305–5313.

[3] First session Forty-first Congress, House Report No. 9; 2 Bartlett, p. 564.

It appears in Pennsylvania, and particularly in Philadelphia, where these wrongs are of frequent occurrence, the courts have uniformly declared such to be the law.

The contestant's brief quotes the acts of assembly governing elections.

That of the sitting Member does not pretend to set up a different standard of action.

Here there is and can be no dispute. Under the act of 1839, where a person is not assessed, in order to entitle himself to vote he must answer certain questions under oath, as to tax, age, residence, etc., and in addition prove his residence by the oath of a qualified voter of the division, and in all such cases it is "the duty of the inspectors" to require such proof whether the vote be challenged or not.

Even if assessed, in case of a challenge they must require the proof. Where the vote is taken, the inspectors must add to the list of taxables furnished them by the commissioners, note of the fact, and of the name of the voucher or person making such proof for the voter. The judges have said, in a number of contested election cases, that nothing can dispense with these requirements. The committee has stated that the law is not disputed. Now, contestant proves that in the sixth division of Seventeenth Ward 98 such unassessed persons were permitted to vote, and in the seventh division of same ward 72 without being sworn themselves or producing a voucher. That in the sixth the list of taxables, which is the index and test of the conduct of an election, was missing from the box. In the seventh it was found, and corroborated contestant's witnesses, as it failed to show that any proof had been required of any unassessed voter. If incumbent denied this there might be some dispute to settle; but his only reply is, "This is an unreliable objection. * * * Among nine election officers at the window, one or more would know the voter personally, and in such cases voters are continually recognized."

If "in such cases voters are continually recognized," it must be in just such election districts as the sixth of the Seventeenth Ward, which, it appears, was discarded by the court of common pleas, only last year, for that very cause. Congress can certainly never lend its sanction to such a shameful breach of law.

The act of 1939 fines any election officer who knowingly takes 1 such vote without proof, $200; and the act of April 16, 1866, inflicts a penalty of $1,000 and an imprisonment of two years for knowingly taking 10 such votes or upward without proof.

With these laws before us, your committee can not fail to pronounce these polls violated by such a crime against the rights of the citizens.

Incumbent's counsel reply that in the sixth division of the Seventeenth Ward 5 of these votes were cast for Mr. Myers, and in the seventh that it is not fully proved for whom they were cast. Were this true it would not alter the matter. On the contrary, the very uncertainty of the result caused by the fraud would tend to destroy all the returns. But it is not true. In the sixth division, Seventeenth Ward, 55 votes were returned for Mr. Myers. He was able to prove 51 of them. Except the remaining 4, and the 5 of those unassessed who voted for him, the 87 unassessed, and all others proved to be illegal, must have been cast for Mr. Moffet.

The report went on to show that challenges in these divisions were disregarded, and other circumstances showed a fraudulent intent.

The minority views [1] do not admit that the evidence as to these wards shows a fraudulent intent, and say:

It is a well-settled principle of law that no citizen shall be deprived of his vote or be disfranchised by reason of any neglect on the part of an officer of the election; hence from the evidence we conclude there is neither reason nor justice in throwing out the entire vote of this division, and in the absence of testimony showing that the 87 who were unassessed and voted were fraudulent, should either invalidate the entire poll or be deducted from either candidate.

That same state of facts exists as to the seventh division of the Seventeenth Ward, except that the contestant made effort to prove his entire vote as cast for him in this division. In this he failed, being able to show but 40 out of 85 given in by the election returns. Seventy-two unassessed votes are again impugned in this division; and it is manifest they were as likely to have been given to one as the other of the candidates.

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[1] Minority views presented by Messrs. Samuel J. Randall, of Pennsylvania, and A. G. Burr, of Illinois.

(2) In the sixth division of the Seventeenth Ward at the beginning of the day there appeared several vacancies on the board of election officers. The law of Pennsylvania required a delay of an hour before opening the polls where there were vacancies in the board of officers. In this ward the Democratic inspectors sent out the only Republican officer in search of others, telling him to "stay out the first hour." This he did, but the poll was opened, and that hour resulted in 69 votes for Moffet and 8 for Myers. The committee conclude all the votes cast in that hour are illegal on both sides. "Votes taken after the time of closing the polls are all illegal on both sides (4 Pennsylvania Law Journal, p. 341), and any taken before the proper hour are equally valueless," say the committee. That there may be no doubt of the criminal intent in this case, the committee claim the right to bring in reference to the conduct of these same officers at an election a few weeks later, when they manifestly connived at election frauds.

(3) On behalf of the sitting Member it was objected that the poll of the tenth division of the Nineteenth Ward should be thrown out because of riot. The majority of the committee find the following facts and conclusions:

The misunderstanding arose from the subdivision of the tenth precinct of the Nineteenth Ward, part being still called the tenth and the rest the fourteenth. By this action of councils, Mr. Addis, who had been elected judge of the old tenth division, became a resident of the new one-the fourteenth. In such cases the law is explicit.

By the act of April 28, 1857, section 1, Pamphlet Laws, page 329, it is provided—

"That whenever a new election division or divisions has been or shall be created in any of the wards of the city of Philadelphia by the councils of said city, the officers to conduct the election next thereafter occurring shall be chosen as follows: If such division shall be formed entirely out of an old division, the officers elected to conduct the election in said division shall appoint the officers for the new division, the judge appointing the judge and each of the inspectors appointing an inspector."

Addis, not aware of this law, had given authority to Hooper to act in the old, but on ascertaining that his appointment would have to be for the new division, he and two of the other legally chosen officers of the old division presented themselves at that poll demanding to act. This was refused by Hooper, whereupon Addis read the law to him, stating that he only desired to do what was right, and after a second refusal Simpson also read the law to him. Unless Hooper should leave, the whole poll might really have been invalid. The police were accordingly summoned, and the violence complained of was no more than necessary to remove Hooper. The others left, Brower among them, and after waiting an hour the citizens chose officers to supply the vacancies.

The committee is compelled to decide that Addis was the legal judge, and that the officers who acted with him were all legally chosen.

It is urged with some force in the brief for the sitting Member that he lost many votes in that division by these occurrences.

It is certain that a number of Democratic voters, apparently in the hope that the whole vote would be declared illegal, some of whom were dissuaded from voting (see p. 193), absented themselves from this poll. Two witnesses guess at the number thus lost, and one other (p. 195) states that the Democrats in November polled 82 more votes there. Ignorance of the law on the part of citizens will not operate to throw out a poll. There was no fraud here. No citizens were deprived of the opportunity of voting. On the contrary, Democrats who wished to vote were furnished tickets or told where they could get them. (See p. 189.)

Suppose your committee should undertake to rectify the error of those who failed to vote; by what standard of law shall it be done? Fraud of the officers it has been shown may disfranchise even those who voted honestly; but to reject this poll for the purpose of correcting the error of some of the citizens would disfranchise 173 Republicans, because, at the farthest, 82 Democrats had been dissuaded from voting, who it appears deposited their ballots in November and might or might not have done so in October under other circumstances.

The majority of the committee reported resolutions declaring sitting Member not entitled to the seat and that contestant was elected and entitled to the seat.

The report was debated April 8 and 9, 1869,[1] and, on the latter day, a proposition of the minority declaring sitting Member entitled to the seat was disagreed to, yeas 40, nays 112.

The resolution declaring sitting Member not entitled to the seat was then agreed to, yeas 107, nays 39. And the resolution declaring contestant elected and entitled to the seat was then agreed to, yeas 113, nays 38.

Mr. Myers then appeared and took the oath.

875. The New York election case of Van Wyck v. Greene in the Fortyfirt Congress.

Form of resolution extending the time for taking testimony in an election case.

Votes cast by persons entitled to naturalization, but naturalized by illegal process, were rejected.

Contestant's notice not having specifically demanded the rejection of an entire precinct, the Committee on Elections corrected the poll, although rejection appeared justifiable.

At a poll where votes were cast by disqualified persons, the return was corrected on the testimony of persons who assumed to know how the disqualified persons voted.

The House declined to declare a seat vacant in a case wherein unsatisfactory proof of contestant's election was reenforced by bad conduct of election officers favorable to contestee.

The House being organized, but a quorum having failed, the Speaker declined to administer the oath to a contestant who had been declared elected.

On March 22, 1869,[2] Mr. John Cessna, of Pennsylvania, from the Committee on Elections, reported the following resolution, which was agreed to:

Resolved, That in the matter of the application for an extension of time to take testimony in the contested case of Van Wyck against Greene, twenty days be allowed to the sitting Member to take evidence, to be confined to evidence to rebut that taken by contestant, and that a like period of twenty days be allowed at the expiration of that period to the contestant if desired by them.

On February 3, 1870,[3] Mr. R. R. Butler, of Tennessee, submitted the report on the merits. It appeared that the returned majority of the sitting Member was 323. Fraud and irregularities were charged on both sides. The main points of the case are:

(1) Contestant alleged fraud and illegality in issuing naturalization papers. The report says at the outset:

The law was decided by the supreme court of the State of New York (see Barbour's Reports, vol. xviii, p. 444). In that case the court said the powers upon courts in admitting aliens to the rights of citizenship are judicial and not ministerial or clerical, and consequently can not be delegated to the clerks, and must be examined by the court itself. An examination must be made in each case suf-

[1] Globe, pp. 650, 683–693; Journal, pp. 178, 211–214.

[2] First session Forty-first Congress, Journal, p. 96; Globe, p. 202.

[3] Second session Forty-first Congress, House Report No. 22; 2 Bartlett, p. 631.

ficient to satisfy the court of the facts upon which the application is based, and upon which it must fail if not proven to the satisfaction of the court. The court, in the same case, adds: "The practice of clerks of courts in issuing certificates of citizenship, without any application being made to the court and on proof of residence only, is an abuse which needs be corrected."

After analyzing the testimony, the majority of the committee say:

The proof fully and satisfactorily establishes the fact that the clerks and deputies issued naturalization papers at various places other than in court. Louis Cuddeback swears that at one court he appointed four deputies to make out naturalization papers, and that they operated in a jury-room, and that he (Cuddeback) made it a rule to visit said jury-room and see how they were getting along and to see that they did it right. * * *

The testimony on the subject of naturalization is very full, and clearly establishes the fact that the law was totally disregarded and frauds perpetrated. The clerk and all his deputies, regular and special, were Democrats, and worked in the interest of their political friends. It further appears from the evidence that,'before the said election, public attention was directed to the frauds practiced in obtaining naturalization papers in said county of Orange, and that the district attorney made an effort to have the matter investigated by a grand jury of the county; and that after the subject had been before the grand jury several days the foreman notified the district attorney that he would not act on the cases, and had destroyed a part of the testimony taken before the jury, and would not surrender the same to the district attorney, as the law directs. And the facts and circumstances warrant the assertion that the Democratic judge winked at the same.

The minority[1] minimize the testimony tending to show irregularities in naturalization, and say:

But the fact stands out clear as testimony can make it, that the men so branded wholesale as wrongfully holding papers were, with very few exceptions, entitled to certificates of naturalization. A "conspiracy" to secure certificates for those legally entitled to them would be senseless and is not charged. On the contrary, the theory of the contestant is, that it was a conspiracy to procure certificates for parties not legally entitled; and to show that they were not entitled, contestant commenced the examination of these newly naturalized citizens (pp. 22–30), and after being questioned, 26 of them developed the fact that each one of them was legally entitled to papers. At this point he dismissed the remainder, some of whom were afterwards examined by contestee and all were shown to be legally entitled to naturalization papers.

In the debate it was retorted[2] that it was "not the right to naturalization, but naturalization itself, awarded by the proper judgment of a court of competent jurisdiction, and this alone" that gave citizenship.

(2) The attempt to trace to the ballot box the votes cast by those illegally naturalized and determine for whom they were cast led to sharp division of opinion.

(*a*) In the First Ward of Newburgh the majority of the committee find that 140 persons not entitled to vote cast their votes for sitting Member. The majority found that the inspectors of election refused to put an oath to persons challenged, although in so refusing they directly violated the statute. The majority of the election officers were of sitting Member's party. Sitting Member's majority was 131.

(*b*) The majority of the committee find that at Hamptonburg the inspectors of election acted "unlawfully and corruptly." They improperly registered alleged voters, and on election day they refused to put the oath to persons challenged. Sitting Member's majority was returned at 105. The majority of the committee deduct 28 from sitting Member.

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[1] Minority views were signed by Messrs. A. G. Burr, of Illinois, S. J. Randall, of Pennsylvania, and P. M. Dox, of Alabama.

[2] By Mr. Churchill, Globe, 1347.

(*c*) In Goshen also the election inspectors dispensed with the oath, and persons were allowed to vote on the irregular naturalization papers in spite of the efforts of the inspector belonging to contestant's party. Sitting Member's majority in the district was 129.

The majority conclude as to these precincts:

> The majority for contestee in the three last-mentioned districts, to wit, First Ward, Newburgh, town of Hamptonburg, and first district Goshen, was 365. The committee is of opinion that the irregularities and misconduct of the inspectors of the election at said districts were sufficient to throw out the entire vote of said districts, but does not recommend the same, as the contestant did not specifically demand the same in his notice to contestee. In all of said precincts actual fraudulent voting was proven; misconduct, illegality, and partiality of inspectors, all go to prove that the allegations of contestant were true that a conspiracy was formed to issue naturalization papers, and to prevent a judicial investigation of the frauds and to prevent an investigation of the many wrongs perpetrated by the friends of contestee.

It being decided not to throw out the entire polls of these places, the majority of the committee propose to purge the polls of these and other precincts by the testimony of people who assumed to know how electors voted.

As to the validity of this testimony the minority took issue, and especially in the debate on the floor. Passages from the testimony were quoted to show that no conclusive evidence was given to connect illegal voters with votes found in the box for sitting Member. Near the close of the debate one Member preferred to rest his vote on the propriety of throwing out entirely the vote of the three precincts, rather than on reliance on the process of purging.

The debate occurred on February 15 and 16,[1] and on the latter date a vote was taken on a proposition of the minority declaring sitting Member entitled to the seat, and it was disagreed to—yeas 56, nays 121.

A proposition offered by Mr. Samuel J. Randall, of Pennsylvania, declaring the seat vacant, was disagreed to without division, the yeas and nays being refused.

The resolution unseating sitting Member was then agreed to without division; and the second resolution of the committee, seating contestant, was agreed to—yeas 56, nays 121.

The usual motion to reconsider being made and laid on the table, a motion to adjourn was made. The vote being taken, the lack of a quorum was developed.

Thereupon, as a question of privilege, a demand was made that Mr. Van Wyck be sworn in.

The Speaker[2] demurred,[3] saying:

> The Chair is in serious doubt whether, in the absence of a quorum, a Member can be sworn in.

The House soon after adjourned without a quorum.

On the next day, February 17,[4] a quorum being present, Mr. Van Wyck appeared and was sworn in.

876. The Pennsylvania election case of Taylor v. Reading in the Forty-first Congress.

The Elections Committee declined to revise the returns on the strength of the tally lists, the election officers not being called or a recount of ballots made.

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[1] Globe, pp. 1305, 1339–1351; Journal, pp. 336–338.

[2] James G. Blaine, of Maine, Speaker.

[3] Globe, p. 1351.

[4] Journal, p. 340; Globe, p. 1373.

United States soldiers residing at the time of enlistment without the precinct and not having the intention of making a permanent residence therein were held not to be legal voters.

Votes of paupers were rejected, although the attorney-general of the State had given an opinion that they were legal voters therein.

On March 29, 1870,[1] Mr. John Cessna, of Pennsylvania, from the Committee on Elections, submitted the report of the majority[2] of the subcommittee in the case of Taylor *v.* Reading, of Pennsylvania. This case involved largely an exploration of questions of fact, but a few general principles were discussed:4

(1) A number of votes depended on whether reliance should be placed on the return from the precinct or on the tally lists, from which the returns were made up. The majority seemed inclined to disregard the tally lists. The sitting member having asked to be credited with certain votes shown by the tally list, which apparently was required to be preserved by the prothonotary, the majority say:

To allow this credit requires us to go behind the returns. The incumbent having asked this at our hands, should have called the officers of the election and shown the list of voters, or, at least, the aggregate thereof, or asked for a recount of the ballots. Nothing of this kind has been requested. On examining the tally list of the seventh division, Twenty-third Ward, we find an error of 6 against the contestant, or rather a difference of 6 between the tally list and the returns from this precinct. We have, therefore, concluded to stand by the returns in each case, especially as the correction of both would make no difference to either party.

The minority do not agree to this, but say:

As a general principle primary evidence is preferable to secondary evidence. The ballots are the primary or highest evidence of an election, and a Pennsylvania statute requires these ballots to be preserved for the purposes of contested elections.

The next best evidence are the tally lists. These are cotemporaneous records made at the very time of voting. The hourly report of the vote and the returns in the prothonotary's office are made up from the tally lists; are mere copies of those lists, and original documents are always better evidence than copies. The tally lists are preferable evidence to reports made from them.

The majority of the committee reject the allowance of these errors in the tally lists, on the ground that the ballot boxes were not examined or asked to be examined. They were not examined in the district where the testimony was taken, because the courts have decided that the Committee of Elections of Congress were the only competent authority to send for them and examine them, and that they were asked to be examined one of the committee making the majority report will cheerfully admit. The sitting Member rested his case, so far as the tally lists were concerned, on the examination of the ballot boxes and a recount of the ballots, but the majority of the committee saw fit to reject these gains without an examination, and the only one that could test their truth or falsity In the absence of the ballot boxes, or a refusal to recount the ballots, the committee must take the highest order of proof presented to them, which are the tally lists certified to them by the seal of the court having charge of them. They are conclusive, and especially so when the committee refuse to avail themselves of the primary evidence—the ballots.

(2) A question arose as to the votes of certain soldiers:

It is in proof that 20 soldiers of the United States Army, stationed at Frankford arsenal, voted for the incumbent in the eighth precinct of the Twenty-third Ward. Had these men a right to vote there? It is entirely immaterial to discuss the question as to whether they could have voted elsewhere or not. The only question before us is as to whether they were entitled to vote at that particular poll, where the

[1] Second session Forty-first Congress, House Report No. 50; 2 Bartlett, p. 661.

[2] Mr. Samuel J. Randall, of Pennsylvania, filed minority views. This case was submitted by a subcommittee of three. Mr. Eugene Hale, of Maine, concurred with Mr. Cessna.

vote was actually cast. To entitle a person to vote at any poll in Pennsylvania, under the laws of that State, he must have at the time of the election an actual residence in the precinct. Mere personal presence will not fulfill the requirements of the law. There must be a residence, and it has been well settled that residence is a question of intention. Had any of those men any intention to be at that particular place, or in that particular precinct, on that or any other day? From the necessity of the case they could not. They were in that precinct not by their own volition, but by command of their military superiors. An order issued to transfer them to Fort Lafayette on October 1 would have taken them far away from the precinct. In the case of Bowen *v.* Given it was expressly decided that an enlisted man did not gain a residence under similar circumstances. So, too, in the case of Howard *v.* Cooper, thirty-sixth Congress (Contested Election Cases, 1843 to 1865, p. 275), it was held under the law of Michigan that to be entitled to vote a man must have come into the State and township or ward with the intention of making it his permanent residence, and the law of Pennsylvania is quite as strict on this point as that of any other State, for if challenged at the poll the person offering the vote must also himself swear that his bona fide residence in pursuance of his lawful calling is within the district. (See Burden's Digest, Laws of Pennsylvania, edition of 1853, pp. 46 and 286.) How could a man so swear when he is there at the command of a power superior to his own will? As bearing particularly upon this point we add that in 1862 a contest arose in the State of Pennsylvania in regard to the right of soldiers to vote in camp or in quarters. In the trial of this case the constitution of Pennsylvania and the several statutes of the State regulating this subject or question were fully and elaborately considered. The case is entitled Chase *against* Miller, and reported in 5 Wright, pages 403 et al. The supreme court of the State held—

First. That residence, in the constitution, is the same as domicile—the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights.

Second. The right of a soldier to vote under the constitution is confined to the election district where he resided at the time of his entering the military service.

After quoting from the opinion the report proceeds to divide the soldiers into three classes:

The first class consists of persons who resided in this precinct at the time of their first enlistment, and consequently did not change residence. There are three of this class, to wit, James Cleary, Peter Hobin, and James Larkin, and their votes are allowed. The second class consists of those persons who had enlisted but once, who resided at the time of their enlistment outside of this precinct, and who had done nothing to indicate any determination on their part to change their residence, and who had made no election of this particular place as their place of residence since the time of their enlistment. On the contrary, two of this class testified that at the very time they voted their families resided elsewhere, and it is clearly proved that the entire class, seven in number, left the place soon after the election and have not returned. They were all single men except these two before referred to. Their names are Richard O'Leary, Owen Sheridan, Robert Armstrong, John Kennedy, John Laffey, Frederick Kopp, and Lewis Bingham. These 7 votes were rejected, being a part of the 51. The third class consists of those who did not reside in the district at the time of their enlistment, but remained for some years, in some cases reenlisting once, twice, and in one case three times. Most of these men have either purchased or rented property, had families in the district, and had given other evidences of an intention to elect this precinct as the place of their abode. These 10 votes are allowed.

The minority do not agree to the rejection of the 7 votes:

Since the action of the Senate of the United States on the 1st day of April, 1870, on the admission to a seat in the Senate of General Ames, who at the time of his election (in the language of the majority of the committee in this case as touching this soldier vote) was not in Mississippi "by his own volition, but by command of his military superiors," I am compelled, therefore, to say that I can not coincide with the majority of the committee in their rejection of 7 of the votes known as the soldier vote.

I can not agree that any of these votes should be rejected. In admitting any of the 20 votes thus attacked, you must admit all. You can not admit a part and reject a part. The integrity of these voters is nowhere impeached. It is no reason for disfranchisement that these men were soldiers and lived at a United States arsenal. They were what is known as the "permanent party" at a United

States station; they had been there for years, enlisting and reenlisting, marrying and raising families. Are such men to be disfranchised?

In Bowen *v.* Given, Justice Cartter, of the District of Columbia, held "that an officer or enlisted man neither gained nor lost a residence; his residence was where he enlisted." In view of this decision, I insist that when the term of enlistment expired, these soldiers, having the animus manendi, gained a residence eo instanti in this division, and it was their residence at the time of their reenlistment; and being so, they were not disqualified by reason of nonresidence.

(3) The majority rejected certain votes of paupers, regarding the right to do so too clear to demand explanation. The minority object to this, citing the opinion of Attorney-General Benj. H. Brewster, of Pennsylvania, who, in a contested election case in the senate of Pennsylvania, had given an opinion that a pauper who was in other respects qualified to vote could not be deprived of the suffrage:

Such a person is a qualified elector and can vote, and his vote cast is a lawful vote and as good as any man's vote, and it ought to be so. The Constitution establishes this, and it does not disqualify him because he is poor. That does not deprive him of his freedom or his citizenship.

They are amenable to the law, and being so, upon the very fundamental principles of our government have a right to be represented and to say who shall make the laws. It is not property or poverty that rules here. It is the man, responsible to God and responsible to the law. To say otherwise would make poverty worse than a crime. The pauper is bound by every law upon the statute book, and is protected by every provision of the Constitution, as much so as the wealthiest, wisest, or most successful man in the community. Sickness, the calamities and accidents of life, may reduce men to this sad condition. That is bad enough. The law never intended to add to his miseries by making him the only slave that remains in our Republic. All the duties of life bind him; he can make a contract, he can be obliged to testify, he can marry, he can sue and be sued, he is only restrained and bound by rules as every one is who lives in any institution. Persons in hospitals, asylums, factories, homes for disabled soldiers, public works, Government shops, and all kinds of public and eleemosynary institutions, as well as private establishments, are bound by fixed rules that are enacted for the preservation of good order, to maintain discipline, and carry out the purposes of the establishments. This is all that he is subjected to, and these rules and the restraints of the house he can relieve himself from at any moment by asking for his discharge. The poorhouse is his residence; it would be there that process of law, criminal or civil, would be served upon him; and it is from that residence he may vote, provided he has lived there ten days preceding the election and conformed to the requirements of the law. If to receive public support would be legal cause of disqualification, we must not forget that even now a large number of white and black citizens of the southern portion of this nation are still receiving and levying upon the supplied bounty of the Government. What would be their condition? For some of those who have received and still receive that bounty were once the wealthiest and best bred, and the most accomplished, and sometimes reputed the wisest people in this region. By the calamities of war they are reduced to want; but God forbid that they or any one should by any calamity be stripped of their right of manhood and brutalized down to that slavery from which we have been, by God's providence, all emancipated.

The minority also cited from the minority report in the case of Foster *v.* Covode.

On the face of the returns the sitting Member received 41 majority. After the settlement of questions of law and fact the majority found that in reality there should be a majority of 72 for the contestant. The minority, on the other hand, found that the sitting Member had a majority of 28 votes.

The report was debated in the House on April 13,[1] and on that day the resolution declaring Mr. Reading not entitled to the seat was agreed to, yeas 114, nays 45. Then the resolution declaring Mr. Taylor entitled to the seat was agreed to without division.

Mr. Taylor then appeared and took the oath.

[1] Journal, pp. 615–617; Globe, pp. 2650–2660.

877. The Senate election case of John P. Stockton, from New Jersey, in the Thirty-ninth Congress.

A committee report that in the absence of any law, State or national, a joint meeting of the two houses of a legislature may prescribe that a plurality vote shall elect a United States Senator was reversed by the Senate.

In 1865[1] the Senate considered the right of a legislative joint convention to adopt a plurality rule for the choice of a United States Senator. The case is thus stated in a report[2] of the Judiciary Committee, submitted by Mr. Lyman Trumbull, of Illinois:

The Committee on the Judiciary, to whom were referred the credentials of John P. Stockton, claiming to have been elected a Senator from the State of New Jersey for six years from the 4th day of March, 1865, together with the protest of certain members of the legislature of said State against the validity of his election, submit the following report:

The only question involved in the decision of Mr. Stockton's right to a seat is whether an election by a plurality of votes of the members of the legislature of New Jersey in joint meeting assembled, in pursuance of a rule adopted by the joint meeting itself, is valid. The protestants insist that it is not, and they deny Mr. Stockton's right to a seat, because, as they say, he was not appointed by a majority of the votes of the joint meeting of the legislature.

The legislative power of the State of New Jersey is vested by the State constitution in a senate and general assembly, which are required, for legislative purposes, to meet separately, but which, for the appointment of various officers, are required to assemble in joint meeting; and when so assembled are, by the constitution itself, styled the "legislature in joint meeting."

The constitution of New Jersey does not prescribe the manner of choosing United States Senators, as, indeed, it could not, the Constitution of the United States having vested that power, in the absence of any law of Congress, exclusively in the legislature; but it does constitute the two houses one body for the purpose of appointing certain State officers. The statute of New Jersey declares that "United States Senators, on the part of that State, shall be appointed by the senate and general assembly in joint meeting assembled;" but it does not prescribe any rules for the government of the joint meeting nor declare the manner of election.

The practice in New Jersey has been for the joint meeting to prescribe the rules for its own government.

In 1794 fifteen rules were adopted, the first two of which are as follows:

"1. That the election of State officers during the present session be viva voce, unless when otherwise ordered, and that all officers be put in nomination at least one day before their election.

"2. That the chairman shall not be entitled to vote except in case of a tie, and then to have a casting vote."

The other thirteen rules related chiefly to the method of conducting the proceedings. Each joint meeting which has since assembled has adopted its own rules, usually those of the preceding joint meeting, sometimes, however, with additions or exceptions.

In 1851 the following additional rule was adopted:

"Resolved, That no person shall be elected to any office, at any joint meeting during the present session, unless there be a majority of all the members elected personally present and agreeing thereto."

In 1855 the joint meeting, after adopting the fifteen rules of the preceding joint meeting, added the following:

"That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared duly elected."

The joint meeting of 1861 adopted the rules of the preceding joint meeting for its own government, among which were the following:

"1. That the election of State officers during the present session be viva voce, unless when other wise ordered.

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[1] Election cases, Senate Doc. No. 11, special session Fifty-eighth Congress, p. 322.

[2] Report No. 4, First session Thirty-ninth Congress.

"15. That in all questions the chairman of the joint meeting be called upon to vote in his turn as one of the representatives in the senate or assembly, but that he have no casting vote as chairman.

"16. That all candidates for office, upon receiving a majority of the votes cast by this joint meeting, shall be declared to be duly elected."

The same rules were adopted by each joint meeting from 1861 to 1865.

The joint meeting which assembled February 15, 1865, and at an adjourned session of which Mr. Stockton was appointed Senator, adopted, at its first meeting, the rules of the preceding joint meeting, except the sixteenth rule, in lieu of which the following was adopted:

"Resolved, That no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature."

After having appointed various officers under the rules which had been adopted at the assembling of the joint meeting, the following rule was adopted:

"Resolved, That the vote for county judges and commissioners of deeds be taken by acclamation, and that the counties in which vacancies exist be called in alphabetical order."

Acting under this rule, quite a number of officers were appointed by acclamation. Not completing its business the joint meeting adjourned from time to time till March 15, when the following rule was adopted:

"Resolved, That the resolution that no candidate shall be declared elected unless upon receiving a majority of the votes of all the members elected to both houses of the legislature be rescinded, and that any candidate receiving a plurality of votes of the members present shall be declared duly elected."

Every member of both houses, 81 in all, was present and voting when the above resolution was passed, and it was carried by a vote of 41 in the affirmative, of whom 11 were senators and 30 representatives, to 40 in the negative, of whom 10 were senators and 30 representatives. The joint meeting then proceeded to the election of a United States Senator, with the following result:

Hon. John P. Stockton, 40 votes; Hon. J. C. Ten Eyck, 37 votes; J. W. Wall, 1 vote; P. D. Vroom, 1 vote; F. T. Frelinghuysen, 1 vote; H. S. Little, 1 vote.

Whereupon John P. Stockton, having received a plurality of all the votes cast, was declared duly elected. The joint meeting then proceeded to the election of various other officers, having completed which, it rose.

The credentials of Mr. Stockton are under the great seal of State, signed by the governor and in due form. No objection appears to have been made at the time to the election. Its validity is now called in question by a protest dated March 20, 1865, and signed by 8 senators and 30 members of the general assembly. The Constitution of the United States declares that the Senate of the United States "shall be composed of two Senators from each State, chosen by the legislature thereof," and that "the times, places, and manner of holding election for Senators and Representatives shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

The right to choose United States Senators in a joint meeting of the two houses which compose the legislature of a State has been too long and too frequently exercised to be now brought in question. This has been the manner of election in some States from the beginning, and is now the manner in most of them.

For the purpose of choosing United States Senators the joint meeting of the two houses is regarded as the legislature, and especially would this be so in New Jersey, where the joint meeting is by the constitution of the State denominated a legislature. It has uniformly been held that when the two branches of a legislature meet in joint convention to elect a United States Senator they are merged into one and act as one body, so that an election may be effected against the entire vote of the members of one house if the person voted for receive the requisite number of votes from members of the other. It being, then, settled that the two houses of a legislature in joint meeting assembled constitute the legislature, vested by the Constitution of the United States with authority, acting as one body, to elect a Senator, the question is: Did the joint meeting of the senate and general assembly of New Jersey, duly convened in pursuance of a resolution previously concurred in by each house separately, choose John P. Stockton United States Senator?

That it was competent for a plurality to elect, if a law to that effect had been prescribed by competent authority, will hardly be questioned. This is the rule very generally, if not universally, adopted in the election of members of the House of Representatives, who are "chosen every second year by the

people of the several States," and no one questions the validity of the election of a Representative by a plurality vote when the law authorizes a plurality to elect. It is, however, insisted, and truly, that no law of New Jersey authorizes a plurality to elect. The laws of New Jersey are silent on this subject, but they do authorize a joint meeting of the two houses of the legislature to appoint a Senator, and it has been the uniform practice of this joint meeting since the foundation of the Government to prescribe the rules for its own government. These rules as to the number of votes necessary to effect an election have varied at different times, sometimes requiring a majority of all the members elected to both houses of the legislature, sometimes a majority only of those present, and in the case under consideration only a Plurality

Suppose, under the rule fast stated, but 79 members had been present in the joint meeting, and 40 had voted for the same person, would he have been elected; and if not, why not? Seventy-nine out of 81 would have constituted a quorum, and 40 would have been a majority of those present. The only reason why such a vote would not have made an election would be the existence of the rule adopted by the joint meeting, declaring that "no candidate should be elected unless receiving a majority of the votes of all the members elected to both houses of the legislature." While that rule was in force no presiding officer would have thought of declaring a candidate elected, nor would any candidate have supposed himself elected because he received a majority of the votes cast, unless such majority was a majority of all the members elected to the legislature. Under the other rule, "that a person receiving a majority of the votes of those present should be declared elected," who would doubt the validity of an election by 31 out of 60 votes if only so many had been cast? If the joint meeting had the right to prescribe at one time that it should require a majority of all elected to the legislature to elect, at another time that a majority of those present might elect, and at still another time that elections might be had by acclamation, it had the right to prescribe that a plurality should elect; and when any candidate received a plurality he thereupon became elected, not simply by the will of those who voted for him, but by the will of the joint meeting, which had previously, by a majority vote, resolved that such plurality should elect.

It might be urged in this case, with much plausibility, that inasmuch as the constitution of New Jersey recognizes the two houses in joint meeting as a legislature, that such joint meeting was the very body on whom the Constitution of the United States had conferred the power to prescribe "the times, places, and manner of holding elections for Senators;" but your committee prefer placing the authority of the joint meeting to prescribe the plurality rule on the broader ground that in the Absence of any law, either of Congress or the State, on the subject, a joint meeting of the two houses of a legislature, duly assembled and vested with authority to elect a United States Senator, has a right to prescribe that a plurality may elect, on the principle that the adoption of such a rule by a majority vote in the fast instance makes the act, subsequently done in pursuance of such majority vote, its own.

The committee recommend for adoption the following resolution:

Resolved, That John P. Stockton was duly elected and is entitled to his seat as a Senator from the State of New Jersey for the term of six yews from the 4th day of March, 1865.

On March 23[1] this resolution was considered, and was agreed to by a vote of yeas 22, nays 21; but on March 26[2] objection was made that Mr. Stockton had been one of those voting in the affirmative, and that he should not have voted. So the vote was reconsidered. And on March 27 the resolution was amended so as to declare Mr. Stockton not entitled to the seat, and then was agreed to, yeas 23, nays 20.[3]

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[1] Globe, pp. 1589–1602.

[2] Globe, pp. 1635–1648.

[3] Globe, pp. 1666–1679.